Supreme Court of the United States

October Term, 1920.

In the Matter
of the
Application of D. H. RIDDLE for a writ of mandamus to HONORABLE W. I. GRUBB, United States District Judge for the Northern District of Alabama, and to the United States District Court for the Eastern Division of the Northern District of Alabama.

And now comes the petitioner, D. H. Riddle, by his attorney, and he moves for leave to file the petition for the issue of a writ of mandamus, and for a rule in relation thereto, hereto annexed, to be directed to Honorable W. I. Grubb, United States District Judge for the Northern District of Alabama.

BENJAMIN CARTER,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

October Term, 1920.

In the Matter
of the
Application of D. H. RIDDLE for a writ of mandamus to HONORABLE W. I. GRUBB, United States District Judge for the Northern District of Alabama, and to the United States District Court for the Eastern Division of the Northern District of Alabama.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, D. H. Riddle, a resident citizen of the city of Talladega, in the State of Alabama, respectfully represents and shows:

That at the fall term, 1919, of the District Court of the United States for the Eastern Division of the Northern District of Alabama your petitioner, with W. A. Savage, M. A. Savage, W. O. Wooten, W. G. Hardy, T. A. St. John and S. E. Graham, was duly indicted by the Grand Jury of said County, for violation of Section 215, Penal Code or Criminal Code of the United States, and thereafter on, to wit, the 16th day of August, 1920, at a term of said court duly and legally held in the city of Anniston in said State of Alabama, your petitioner, and those jointly indicted with him entered a plea of not guilty to said indictment, and the trial of your petitioner and his co-defendants was thereupon on said 16th day of August, 1920 duly entered upon, the said United States being represented

by Honorable Erle Pettus, United States District Attorney for said Northern District of Alabama, and petitioner by Hugo Black, Esq., and petitioner's co-defendants by other counsel.

That after your petitioner and each of his co-defendants had pleaded not guilty to said indictment and the said United States District Attorney and your petitioner and his co-defendants had announced ready for trial, the said District Court began to organize a jury for the trial of your petitioner and his co-defendants on said indictment. That the jurors summoned to appear at said term of Court, and who appeared in answer to said summons, were called one after another until the entire panel of jurors who had appeared in response to writs summoning jurors to that term of court had answered present, and had been accepted or rejected by the United States or by your petitioner and his co-defendants as duly qualified jurors to try the issues joined between the United States and petitioner and his co-defendants. That it then appeared that there were eleven such jurors so selected and accepted, and no more.

That Honorable W. I. Grubb, the Judge presiding, thereupon duly ordered that the United States marshal in attendance upon said court summon talesmen to complete the panel of jurors, and the said marshal in compliance with said order, did immediately summon six additional citizens to serve as talesmen, all of said talesmen being present in court. That each of said six talesmen was found to be duly qualified to serve as a juror in said court. That before any one of said talesmen was called as a juror to complete the panel of jurors in the said case of the United States against your petitioner and his co-defendants, so that said jury should consist of twelve jurors instead of eleven jurors, the

court, upon being informed that an oral agreement had been made and entered into by and between the Honorable Erle Pettus, United States District Attorney, and the attorneys representing your petitioner and his co-defendants, that said cause should be tried by the eleven jurors then in the box, and no more, excused all of said talesmen and said eleven jurors and no more were thereupon sworn and empanelled to try the issue joined between the United States and your petitioner and his co-defendants. That said eleven jurors, and no more, so sworn and empanelled, after hearing the evidence and argument of counsel for the United States and your petitioner and his co-defendants, and the charge of the court, and after due deliberation, came into court and reported that they had agreed upon a verdict and said verdict was "guilty" as to your petitioner and his co-defendants on counts 2, 4, and 5 of said indictment, and thereupon the said court entered a judgment against your petitioner, in words and figures as follows, to wit:

> "ORDERED, ADJUDGED AND DECREED by the court that the defendant, D. H. Riddle, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Hundred Dollars on Count Two of the Indictment, and it is further ordered, adjudged and decreed by the Court that the defendant, D. H. Riddle be and he hereby is further sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen months and to pay a fine of One Hundred Dollars on Count Four of the Indictment, said sentence of imprisonment and confinement under Count Four of the Indictment to commence at the termination of the sentence of imprisonment and confinement

under Count Two of the Indictment, and it is further ordered, adjudged and decreed by the Court that the defendant, D. H. Riddle, be and he hereby is further sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen months and to pay a fine of Ten Thousand Dollars on Count Five of the Indictment, said sentence of imprisonment and confinement under Count Five of the Indictment to commence at the termination of the sentence of imprisonment and confinement imposed under Count Four of the Indictment."

Petitioner further shows that the clerk of the said United States District Court, in writing up the minute or judgment entry of said trial, did not truly state that to try said cause came J. W. McClurkin and ten other good and lawful men, duly empaneled, sworn and charged a true verdict to render according to the law and the evidence, who, by consent of the attorneys for the respective parties, and consent of the several defendants, were duly empaneled and sworn as a jury and charged a true verdict to render, but wrote up said minute entry in this regard as follows:

"To try this cause come a jury of good and lawful men duly empanelled, sworn and charged a true verdict to render according to the law and the evidence."

That thereafter on, to wit, the 18th day of September, 1920, during the term of said court at which said verdict was rendered and judgment entered, your petitioner presented to the Honorable W. I. Grubb, Judge of said Court, who presided at said trial, a verified petition praying that said clerk of said court be directed to amend said minute entry by making it disclose and recite that the jury trying said cause was composed of

eleven men, instead of twelve men, and stating any facts, agreements or understandings which might be regarded as necessary to the end that your petitioner might not be deprived of his rights guaranteed to him under the Constitution of the United States of a trial by a jury of twelve men.

Upon presentation of said petition to the Honorable W. I. Grubb, as aforesaid, he, the said Judge, endorsed thereon, the following:

> "Presented this 18th day of September, 1920.
> W. I. Grubb, District Judge."

And on the 26th day of October, 1920, endorsed thereon the following:

> "Motion denied, this 26th day of October, 1920.
> W. I. Grubb, District Judge."

Petitioner further alleges and shows that on, to wit, the 26th day of October, 1920, during the term at which your petitioner was tried, convicted and sentenced, said United States District Court, with the Honorable W. I. Grubb judge thereof presiding, was regularly convened and held in said city of Anniston, and the motion of your petitioner to have the clerk of the said court correct the minute entry in said proceeding against your petitioner and his co-defendants and his motion to quash and set aside the judgment theretofore rendered in said cause, was taken up for hearing, your petitioner being present in person and represented by counsel, and petitioner's co-defendants being present in person, and the United States being represented by the Honorable Erle Pettus, said District Attorney. That to said petition no demurrer, plea or answer was filed by or on behalf of the United States or any one else, and the only pleading before the court on that hearing was the said verified petition.

That although the facts in said petition were not denied and the truth thereof was well known to his honor W. I. Grubb, judge presiding, and to the said District Attorney, your petitioner offered, and proposed to prove, both by affidavits of persons present during the trial of said cause and by the stenographer who reported the testimony and proceedings in said cause, and who was present and reported what was done with respect to the swearing and empanelling of the jury in said cause, that eleven jurors, and no more, were sworn and empanelled as such jurors. That to each question propounded to each of said witnesses calling for such testimony, the said District Attorney objected on the grounds that the question called for illegal, irrelevant and immaterial and incompetent testimony and sought to alter the record by extraneous testimony, which objections were, in each instance, sustained by the court, and petitioner was not allowed to make the proof of the material facts alleged in his said petition, or any of them.

Said District Attorney also objected to each of the affidavits offered in evidence by petitioner, and said objections were sustained by the court. Attached hereto, as Appendix "A," is a transcript which shows all evidence admitted by the court on the hearing of said motion, reproduced verbatim from the stenographer's notes, as certified to by him; and petitioner prays that the same may be read as a part hereof.

Petitioner also attaches hereto the original affidavits which were offered in evidence.

As Appendix "B," petitioner attaches hereto a certified copy of so much of the record of the original case of United States against your petitioner and his co-defendants in the United States District Court as is deemed material, said copy including the petition filed

by your petitioner in said cause with the action of said District Court and the Hon. W. I. Grubb, the Judge thereon; and petitioner prays that the same will be read as a part hereof.

Wherefore, your petitioner feeling himself aggrieved and deprived of his constitutional rights because of the refusal of the United States District Court for the Eastern Division of the Northern District of Alabama to cause the minute entry or judgment entry in said case of the United States against your petitioner and his co-defendants to be amended so as to speak the exact truth and show that the jury trying said cause consisted of J. W. McClurkin and ten others, and no more, or eleven jurors and no more, and being advised by counsel that the said refusal of said District Court was contrary to law and highly prejudicial to your petitioner, petitioner respectfully prays that a Rule be made and issue to Honorable W. I. Grubb, Judge of said United States District Court for the Northern District of Alabama, to show cause why a writ of mandamus should not issue commanding said W. I. Grubb, District Judge aforesaid, or said United States District Court for the Northern District of Alabama, to direct and cause the minute or judgment entry in said criminal proceeding of the United States *v.* D. H. Riddle, et als, to be corrected so as to show that in the trial of said cause eleven jurors and no more, were sworn and empanelled and said eleven jurors and no more returned the verdict upon which judgment was rendered against your petitioner and his co-defendants, and for such other and further relief as to this honorable court may seem just and meet, and your petitioner will ever pray, etc.

STATE OF ALABAMA, }
County of, } *ss:*

Before me, a notary public in and for said State and county, D. H. Riddle, petitioner in the foregoing petition, being by me sworn, made oath that the allegations of said petition are true to the best of his information, knowledge and belief.

D. H. RIDDLE.

Subscribed and sworn to before me this first day of December, 1920.

BESSE THORNTON,
Notary Public.

LONDON, YANCEY & BROWER,
BENJAMIN CARTER,
Counsel.

APPENDIX A.

TESTIMONY ON MOTION TO CORRECT JUDGMENT.

United States	No. 744 in the District Court of the United States for the Eastern Division of the Northern District of Alabama.
v.	
D. H. Riddle *et als.*	October 26th, 1920.

GRUBB, J.

Appearances:

For the United States: Erle Pettus Esquire, United States Attorney
Ralph Quinn Esquire, Assistant United States Attorney
Jim C. Smith Esquire, Assistant United States Attorney.

For Defendants:
Mr. Tate
Mr. Ellis
Mr. Smith
Mr. Freeman
Mr. Brower.

TESTIMONY ON MOTION TO CORRECT JUDGMENT

Mr. Brower: We offer in evidence affidavits of S. E. Graham, W. O. Wooten and L. H. Ellis.

Mr. Pettus: We object to each of the affidavits, separately.

The Court: On what grounds?

Mr. Pettus: We object on the ground that it is not the proper way to establish a record; on the ground that they are immaterial, irrelevant and incompetent and on the ground that the record can not be altered or changed by extraneous evidence.

The Court: I sustain the objection.

Mr. Brower: We except.

B. S. DORMON.

A witness introduced in behalf of the movants, was sworn and testified as follows:

By Mr. Brower:

Q. Is your name B. S. Dormon?

A. Yes, sir.

Q. You were the court stenographer in this court during the trial of this case, *United States* v. *Riddle, et al*?

A. Yes, sir. I reported the testimony in the case in connection with Mr. Renn. He and I together reported it. He worked half of the day and I worked the other half of the day.

Q. Were you the stenographer at the beginning of the trial?

A. Yes, sir.

Q. Took the organization of the court?

A. I took the proceedings up to the time Mr. Pegram made his opening statement to the jury, which was the last opening statement just before the testimony started.

Q. Were you the stenographer at the time of the empaneling of the jury?

A. Yes, sir.

Q. Have you your original notes taken at that trial?

A. Yes, sir.

Q. Will you refer to them?

A. Yes, sir.

Mr. Pettus: We object to reading them.

Q. I will ask you if your notes show that only eleven men were organized on the jury?

Mr. Pettus: We object to that on the grounds that it is illegal, irrelevant, immaterial and incompetent, and it seeks to alter the record by extraneous testimony.

The Court: Sustain the objection.

A. (No answer.)

Q. Were you the official stenographer in that case?

Mr. Pettus: We object to that on the grounds that it is illegal, irrelevant, immaterial and incompetent.

A. There was no official stenographer as I know of, I was just employed———

The Court: Sustain the objection.

Mr. Brower: We except to your Honor not allowing the witness to testify as to what his notes show as to the organization of the jury, and we expect those notes to show that only eleven men were empaneled, and that was taken down here in shorthand by the stenographer.

Mr. Pettus: And we object.

The Court: Sustain the objection.

Q. Those are the original notes that you hold in your hand?

A. Yes, sir.

Mr. Brower: We offer the original notes.

Mr. Pettus: We object.

A. (No answer.)

Q. I will ask you are they correct?

A. They are correct, but nobody in the world can read them but me.

Mr. Brower: We offer those in connection with the organization of the jury.

Mr. Pettus: We object.

The Court: Sustain the objection.

Mr. Brower: We except.

Q. Were you—how did you happen to take the testimony here, were you selected by the United States Attorney?

Mr. Pettus: We object on the ground that it is illegal, irrelevant, immaterial and incompetent.

The Court: Sustain the objection.

Mr. Brower: We except.

A. (No answer.)

Q. I will ask you if, as a matter of fact, if you were not employed by the defendants and the United States Attorney, to be paid by them, to take the evidence in this case and the organization of the court, and so forth, with reference to that case?

Mr. Pettus: We object on the grounds that it is illegal, irrelevant, immaterial and incompetent.

The Court: Sustain the objection.

Mr. Brower: We except, and we expect to show that he was to be paid by the United States and the defendants for his services in taking the evidence and other matters connected with the trial of that case.

A. (No answer.)

Mr. Brower: That's all, Mr. Dormon.

Mr. Pettus: No questions.

Witness excused:

H. A. Skeggs.

A witness introduced in behalf of movants, was sworn and testified as follows:

By Mr. Brower:

Q. This is Mr. H. A. Skeggs?

A. Yes, sir.

Q. You are the United States Marshal for this District?

A. Yes sir.

Q. Were you present at the trial of the case of *United States* v. *D. H. Riddle, et als,* case number 744, in this court, in August of this year?

A. Yes sir.

Q. I will ask you if you have any record which was kept in this court that shows how many jurors served in that case?

Mr. Pettus: We object, on the ground that it is irrelevant, immaterial and incompetent and calls for extraneous testimony.

The Court: The court knows what the record is, of course. The marshal can't testify to it. You can ask him what data he has, if you want to. The record is a matter of law.

A. (No answer.)

Q. I will ask you what data you have in your possession showing the number of jurors that sat in that case?

Mr. Petfus: We object, on the ground that it is irrelevant, immaterial and incompetent and is an effort to alter the record by extraneous testimony.

The Court: I will let him testify what data he has.

A. I haven't any, sir.

Q. Have you got the record that you keep in cases, in reference to juries, here?

A. I don't keep any records.

Q. Do you keep any record as to who you pay as jurors?

Mr. Pettus: We object, on the ground that it is irrelevant, immaterial and incompetent.

The Court: I sustain the objection.

Mr. Brower: We except, and expect the answer to show that they do have a record showing what jurors were paid, and that only eleven were paid as serving in that case and that he paid all of them.

Mr. Pettus: We object.

The Court: I sustain the objection.

Mr. Brower: We except.

A. (No answer.)

Q. Have you any records here with reference to the trial of that case?

Mr. Pettus: We object to that.

The Court: I overrule the objection.

A. No.

Q. Are there any in your possession?

A. No, sir.

Q. There are none?

A. No, sir.

Q. In order to get it clear—I don't know whether the other question covered it or not.— Have you any record or any data in your possession showing the number of jurymen and the names of the jurymen paid for services rendered in that trial?

Mr. Pettus: We object to that.
The Court: I sustain the objection.
Mr. Brower: We except.

A. (No answer.)
Q. That's all, Mr. Skeggs.

Witness excused.

C. J. Allison.

A witness introduced in behalf of movants, was sworn and testified as follows:

By Mr. Brower:

Mr. Allison, are you the Clerk of the United States Court?
A. Yes sir.
Q. Will you tell us just how jurors are paid in this court and what data is kept in reference to their payment, if any?

Mr. Pettus: We object to that on the ground that it is irrelevant, immaterial and incompetent.
The Court: I sustain the objection.
Mr. Brower: We except.

A. (No answer.)
Q. I will ask you whether or not you have in your office any data showing what jurors were paid or what jurors served in the trial of the case of the *United States* v. *D. H. Riddle, et als,* in this court?

Mr. Pettus: We object to the question, on the ground that it is irrelevant, immaterial and incompetent.
The Court: I sustain the objection.
Mr. Brower: We expect to connect that up by showing that all of them were paid.

The Court: That is not a record of the court, the Marshal's certificates of payment. That wouldn't be a record of the court.

Mr. Brower: We except.

Q. I will ask you if any data is kept by you in your office, as Clerk of this Court, showing what jurors served in any case?

Mr. Pettus: We object to that.

The Court: I overrule the objection.

A. No, we don't keep any record.

Q. There are no records then, whether ten men serve in a case, or eleven?

A. No.

Q. Or who the jurors are?

Mr. Pettus: We object.

The Court: I overrule the objection.

A. No, we don't keep any record of that. We keep a record of the jurymen that are summoned.

Q. Insofar as any record that is kept by the Clerk of this Court, it would never show how many men sat on a jury?

Mr. Pettus: We object.

The Court: Yes, that's an argument.

A. (No answer.)

Q. There are no records, as I understand it?

A. The only record we keep is of the foreman.

Q. I didn't understand you.

A. Sometimes we keep the foreman's name.

Q. I will ask you if it is not a fact, Mr. Allison, that in this particular case the judgment was written up—Did you see the first judgment that was written up?

Mr. Pettus: We object.

The Court: I sustain the objection.

Mr. Brower: We except.

A. (No answer.)

Q. Do you know when the judgment in this case was written up?

Mr. Pettus: We object to that as immaterial.

The Court: I sustain the objection.

Mr. Brower: We except. We expect the evidence to show that the judgment was not written up until some several days after the trial.

The Court: I sustain the objection.

Mr. Brower: We except.

A. (No answer.)

Q. I will ask you, Mr. Allison, if the judgment that appears in the record here now is the first judgment that was prepared in this case?

Mr. Pettus: We object.

The Court: The first judgment would be the first and only judgment authorized by the court. I sustain the objection.

Mr. Brower: We expect the answer to show that a purported judgment was written up and sent here to this court house, from Birmingham, which set out eleven names, and that that judgment was afterward superceded by another that did not set out the names.

Mr. Pettus: We object to that.

The Court: I sustain the objection.

Mr. Brower: We except.

A. (No answer.)

Q. I will ask you if you know who did write up the judgment in this case?

Mr. Petus: We object to that.

The Court: I sustain the objection.

Mr. Brower: We except.

A. (No answer.)

Q. I will ask you how many jurors, if you know, sat in the trial of the case?

Mr. Pettus: We object.

The Court: I sustain the objection.

Mr. Brower: We expect the answer to show that he does know and that only eleven men sat and that only eleven rendered the verdict.

Mr. Pettus: We object to it.
The Court: I sustain the objection.
Mr. Brower: We except.

A. (No answer.)
Q. That's all, Mr. Allison.

Witness excused.

ERLE PETTUS.

A witness introduced in behalf of movants, was sworn and testified as follows:

By Mr. Brower:

Q. This is Mr. Erle Pettus, District Attorney of the United States for this district?
A. Yes, sir.
Q. Did you prosecute in the case of *United States* v. *D. H. Riddle et als?*
A. Yes, sir.
Q. Case number 744, the one involved in this petition?
A. I don't recall the number.
Q. I will ask you whether or not the judgment that appears in the records here was written up in your office?

Mr. Quinn: We object to that question.
The Court: I sustain the objection.
Mr. Brower: We except, and expect to show that it was and that it first contained eleven names, eleven jurors and only eleven, and that afterward it was changed.
Mr. Quinn: We object to it.
The Court: I sustain the objection.
Mr. Brower: We except.

A. (No answer.)
Q. I will ask you whether or not, acting for the United States in the prosecution of this case, on the trial of it, you agreed to try this case with eleven jurors and did try it with eleven jurors?

Mr. Quinn: We object to the question.
The Court: I sustain the objection.
Mr. Brower: We except, and expect the answer to show that it was rendered by eleven jurors.

A. (No answer.)

Q. Mr. Pettus: I will ask you whether or not any records or any data are kept by the prosecuting attorney's office, showing the jurors that sit in cases in this court?

A. None that I know of.

Q. If there were any such records you would know of them, wouldn't you?

A. I think so.

Q. I will ask you if the judgment as first written up didn't contain the names of eleven jurors?

Mr. Quinn: We object.
The Court: I sustain the objection.

A. (No answer.)

Q. And only eleven?

Mr. Quinn: We object to the question.
The Court: I sustain the objection.
Mr. Brower: We except, and expect to show that that was a fact.

A. (No answer.)

Q. I guess that's all, Mr. Pettus.

Witness excused.

C. J. Allison.

Recalled, testified as follows:

By Mr. Brower:

Q. From what data is the judgment prepared? From what data was it prepared in this case?

Mr. Pettus: We object.
The Court: I sustain the objection.
Mr. Brower: We except.

A. (No answer.)

Q. I will ask you if there are any bench notes of any kind kept by the Judge or turned over to you from which to prepare judgments.

Mr. Pettus: We object.

The Court: I overrule the objection.

A. What was the question?

Q. Any bench notes made by the Judge during the course of the trial, turned over to you in this case?

A. No, sir.

Q. For the preparation of the judgment entered?

A. Nothing at all.

Q. I will ask you whether or not any bench notes are kept by the Judge?

A. I don't know.

Mr. Pettus: We object.

A. I think the Judge sometimes keeps some notes, but I don't know whether they are bench notes or not. I don't know whether he kept any in the Riddle case or not.

The Court: The verdict of the jury and the rulings on pleadings.

Q. Any memorandum of any kind in reference to any consent that might be agreed to?

The Court: Only rulings on pleadings and the verdict of the jury.

Q. (No answer.)

Mr. Brower: We would like to have the record show that we offered to show by the Judge himself that only eleven men sat in the case.

Mr. Pettus: We object.

The Court: I sustain the objection.

Mr. Brower: We would expect the answer to a question to that effect—of course I don't want to interrogate the Judge—but I want to get the benefit of it.

The Court: That's all right.

Mr. Brower: I expect if a question was propounded to the Court as to how many jurors sat in this case and rendered a verdict in this case, that the Court would state that only eleven jurors, and that the eleven sat on account of an agreement between the Prosecuting Attorney for the United States and the attorneys representing the defendants, and the defendants themselves, and not twelve men. Of course, unless we can have the benefit of that I would have to interrogate the Judge.

Mr. Pettus: We object.

The Court: I understand that you propound the question and that it is objected to, and I sustain the objection.

Mr. Brower: Yes, sir, and we reserve an exception to the ruling of the Court.

Mr. Pettus: We want to add the ground that the Judge can't be made a witness in his own court.

Mr. Brower: We would like to be in position also —I would just like to ask the Court if the Court, in order to get it in the record—the Court took absolutely no notes in reference to the organization of the jury in this case?

The Court: None at all.

Mr. Brower: Nothing to show that there was any consent to try with eleven men?

The Court: Nothing at all.

Mr. Brower: We offer in evidence, on the motion we offer in evidence the judgment itself.

The Court: The whole record in the case will be in evidence. Any further testimony?

Mr. Ellis: To get my mind clear: I understand the question was not asked your Honor direct as to whether or not eleven men sat and rendered the verdict, or twelve, but it was just considered as asked. Of course, we don't want to embarrass the Court—

The Court: I understood that the question was asked and objected to and the objection sustained and an exception granted.

Witness excused.

J. T. Ross.

A witness introduced in behalf of movants, was sworn and testified as follows:

By Mr. Brower:

Q. What are your initials?

A. J. T.

Q. Were you one of the jurors in the case of *United States* v. *Riddle* and *Savage et als?*

A. I was, sir.

Q. In this court, in August of this year?

A. Yes, sir.

Q. Do you know how many jurors were on that jury?

Mr. Pettus: We object.

The Court: I sustain the objection.

Mr. Brower: We except, and expect to show that he does know how many and that there were only eleven.

Mr. Pettus: We object.

The Court: I sustain the objection.

Mr. Brower: We except.

A. (Answer.)

Q. I will ask you how many jurors sat in that case and how many jurors rendered the verdict in the case?

Mr. Pettus: We object.

The Court: I sustain the objection.

Mr. Brower: We except, and expect to show that eleven and eleven only.

Q. I will ask you whether you were with the jury at all times after it was organized and if they were kept together all the time and if at any time there were more than eleven jurors?

Mr. Pettus: We object.

The Court: I sustain the objection.

Mr. Brower: We except.

A. (No answer.)

Q. I will ask you if you heard it stated in the beginning of the trial, between the Prosecuting Attorney, Mr.

Pettus, and the attorneys representing the defendants, here in open court, when the jury was being empaneled, that they would go ahead and try the case with eleven men, by consent?

Mr. Pettus: We object.

The Court: I sustain the objection.

Mr. Brower: We except and expect to show by Mr. Ross that he did hear that and that it did happen here in this court.

A. (No answer.)

Q. That's all, Mr. Ross.

Witness excused.

Evidence closed.

I hereby certify that the above and foregoing 19 pages compose a true and correct transcript of my shorthand notes of testimony taken on the trial of a motion to correct judgment in the case of *United States* v. *D. H. Riddle et al*, in the District Court of the United States for the Eastern Division of the Northern District of Alabama, on the 26th day of October, 1920.

Witness my hand this October 26, 1920.

B. S. DORMON,
Reporter.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

UNITED STATES
v.
D. H. RIDDLE, W. A. SAVAGE, A. M. SAVAGE, W. O. WOOTEN, W. G. Hardy, T. A. ST. JOHN, AND S. E. GRAHAM. } No. 744.

Personally appeared before me, the undersigned authority in and for the State of Alabama, Calhoun

County, D. H. Riddle, who being by me first duly sworn, deposes and says: That he was present in the court room during the trial of the above styled cause; that he knows of his own personal knowledge that eleven jurors and only eleven jurors were empaneled to try said cause, and that the jury which did try said cause and rendered a verdict therein was composed of eleven men only and not twelve men.

D. H. RIDDLE.

Sworn to and subscribed before me this October the 25th, 1920.

B. F. DORMON,
Notary Public.

Personally appeared before me, the undersigned authority in and for the State of Alabama, Calhoun County, L. H. Ellis, who being by me first duly sworn, deposes and says: That he was present in the court room during the trial of the above styled cause; that he knows of his own personal knowledge that eleven jurors and only eleven jurors were empaneled to try said cause, and that the jury which did try said cause and rendered a verdict therein was composed of eleven men only and not twelve men.

L. H. ELLIS.

Sworn to and subscribed before me this October the 26th, 1920.

CHAS. J. ALLISON,
Clerk.

Personally appeared before me, the undersigned authority in and for the State of Alabama, Calhoun County, S. E. Graham, who being by me first duly sworn, deposes and says: That he was present in the

court room during the trial of the above styled cause; that he knows of his own personal knowledge that eleven jurors and only eleven jurors were empaneled to try said cause, and that the jury which did try said cause and rendered a verdict therein was composed of eleven men only and not twelve men.

S. E. GRAHAM.

Sworn to and subscribed before me this October the 25th, 1920.

B. S. DORMON,
Notary Public.

APPENDIX B.

Transcript of Record.

In the matter of
The United States of America
versus
D. H. Riddle, W. O. Wooten,
W. A. Savage, A. M. Savage,
T. A. St. John, W. G. Hardy,
S. E. Graham.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Fall Term, 1919.

Count 1. Vio. Sec. 215 P. C. The Grand Jurors of the United States elected, empanelled, sworn and charged to inquire for the body of the said Eastern Division of the Northern District of Alabama, upon their oaths present; That heretofore, to-wit, on or about the first day of March, A. D., 1918, at or near Talladega, in the County of Talladega, and State of Alabama, and within the jurisdiction of this court, D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy, and S. E. Graham, whose names are otherwise unknown to the grand jurors, having then and there devised and intending to devise a scheme and artifice to defraud various and sundry persons whose names and descriptions are to the Grand Jurors unknown, and for obtaining money by means of false and fraudulent pretenses, representations, and promises from said persons unknown, which said scheme and artifice was in substance as follows, to-wit: That the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, would agree and arrange by and between themselves to sell and offer for sale to said

persons unknown, and did then and there actually sell to said persons unknown, with like intent and purpose on their part to defraud said persons unknown, large quantities of baled lint cotton, the quantity and a further description of which being to the Grand Jurors unknown; and the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, would fraudulently represent and pretend, and cause to be represented and pretended to said persons unknown that said cotton was of a superior grade and quality, to-wit, good middling, strict middling, good middling light tinges, strict middling to good middling, even running strict middling, one to one and one-sixteenth inch staple, which was in fact a higher grade and quality than said cotton actually was; and would fraudulently represent and pretend and caused to be represented and pretended to said persons unknown that the weights of said cotton were greatly in excess of what they actually were, the exact weight as thus fraudulent represented and pretended being to the Grand Jurors unknown, and the actual weights of said cotton being to the Grand Jurors unknown; that at the time the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham would agree by and between themselves to sell and offer for sale, and at the time they did then and there offer for sale to said persons unknown said cotton, said representations and pretenses made and caused to be made by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St John, W. G. Hardy, and S. E. Graham to said persons unknown as to the grade, quality and weights of said cotton were false, fraudulent and untrue, said cotton being of an inferior grade and quality and the same weighing far less than represented and pretended by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M, Savage, T. A. St. John, W. G. Hardy and S. E. Graham. and they the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham well knew said representations and pretenses to be false and fraudulent at the time they made

the same and caused the same to be made, and the same were made as aforesaid with the intent and purpose on their part to defraud and for obtaining money from said persons unknown by means of said false and fraudulent pretenses and representations as aforesaid; and for the purpose of executing said scheme and artifice and attempting to do so, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, on or about to-wit: at various times from March first, 1918, to April first, 1918, did place and cause to be placed in the Postoffice of the United States at Talladega, in said Talladega County, Alabama, Division and District aforesaid, numerous letters, bills of lading and other mail matter, the number and further description of which being to the Grand Jurors unknown, addressed to said divers and sundry persons unknown, to be sent and delivered by the post office establishment of the United States and which were in fact so sent and delivered to said persons unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

COUNT 2. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid, and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, having then and there devised and intending to devise a scheme and artifice to defraud Buffalo Manufacturing Company at Shelby, North Carolina, a further description of which said company is to the Grand Jurors unknown, and for obtaining money from the said Buffalo Manufacturing Company by means of false and fraudulent representations, pretenses and promises, which said scheme and artifice was in substance as follows, to-wit: That the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy, and S. E. Graham, whose names are otherwise unknown to the Grand Jurors

would agree and arrange by and between themselves to sell and offer for sale, through and by the Savage Cotton Company, a corporation then doing business at Talladega, Alabama, to the said Buffalo Manufacturing Company at Shelby, North Carolina, and did then and there actually sell to said Buffalo Manufacturing Company, with like intent and purpose on their part to defraud Buffalo Manufacturing Company, One Hundred (100) bales of lint cotton represented to be strict middling, one to one and one sixteenth inch staple, and represented to weigh Forty-Nine Thousand Five Hundred and Ninety-two (49,592) pounds; that the representations made and caused to be made by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham as to the grade and weights of said cotton were false, fraudulent and untrue, and the said D. H. Riddle, W. O Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, well knew that said representations and pretenses were false, fraudulent and untrue at the time they made the same; said cotton was of a far inferior grade and quality and the weights as represented were far in excess of the actual weights, grade and quality of said cotton, and this the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham well knew, and the said false and fraudulent pretenses and representations were made and caused to be made by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham with the intent and purpose on their part to defraud the said Buffalo Manufacturing Company, and for obtaining money from said company by means of said false and fraudulent pretenses and representations as aforesaid; and for the purpose of executing said scheme and artifice and attempting to do so, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, did on or about the 18th day of March, A.D. 1918, place and caused to be placed in the postoffice of the United States at Talladega, in Talladega County, Alabama, Division and

District aforesaid, a certain letter dated March 18th, 1918, 5:00 P. M., and addressed to H. T. Lampkin & Company, Charlotte, North Carolina, and purporting to be signed by Savage Cotton Company, per W. A. Savage, which said letter is in words and figures as follows:

Codes Shepperson 78 81 15 Myers, 39

"Savage Cotton Company, Inc.,
Cotton
Talladega, Alabama.
March 18, 1918,
5:00 P. M.

H. T. Lampkin & Company,
Charlotte, N. C.
Gentlemen:

Enclosed herewith find our Invoice, Bill Lading, and detailed Weight Sheet on the 100 B/C shipped to Buffalo Mfg. Company, Stubbs, N. C.

Yours very truly,
SAVAGE COTTON COMPANY, INC.,
Per W. A. Savage, *Gen. Manager.*"

which said letter was to be sent and delivered by the post office establishment of the United States to the said H. T. Lampkin & Company, Charlotte, North Carolina, and which was in fact so sent and delivered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

COUNT 3. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid, and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy, and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, having then and there devised and intending to devise a certain scheme and artifice to defraud Roxboro Cotton Mills, at Roxboro, North Carolina, and for obtaining money from said Roxboro Cotton Mills by means of false and fraudulent pretenses, representations and promises, which said

scheme and artifice is set out substantially in Count Two of this Indictment, to which reference is hereby made; for the purpose of executing said scheme and artifice and attempting to do so, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St John, W. G. Hardy and S. E. Graham did on or about April 2d, 1918, place and cause to be placed in the post office of the United States at Talladega, Alabama, Division and District aforesaid, a certain letter purporting to be signed by Savage Cotton Company per W. A. Savage, and addressed to H. T. Lampkin, Charlotte, North Carolina, which said letter is in words and figures as follows:

"Savage Cotton Company, Inc.
Cotton
Talladega, Alabama,
April 2d, 1918.

H. T. Lamkin & Company,
Charlotte, N. C.
Gentlemen:

Enclosed herewith find original Invoice and Detailed Weight Sheets on 100 B/C shipped to the Roxboro Cotton Mills, Roxboro, North Carolina.

Yours very truly,
SAVAGE COTTON COMPANY, INC.,
Per W. A. Savage,
General Manager."

which said letter was to be sent and delivered to said H. T. Lampkin & Company, at Charlotte, North Carolina, by the post office establishment of the United States, and which was in fact so sent and delivered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

COUNT 4. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid, and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise

unknown to the Grand Jurors, having then and there devised and intending to devise a certain scheme and artifice to defraud the Entwistle Manufacturing Corporation, at Rockingham, North Carolina, a further description of which said company being to the Grand Jurors unknown, and for obtaining money from the said Entwistle Manufacturing Corporation by means of false and fraudulent representations, pretenses, and promises, which said scheme and artifice was in substance as follows, to-wit:

That the said D. H. Riddle, W. O Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, would agree and arrange by and between themselves to sell and offer for sale and cause to be sold and offered for sale through and by the Savage Cotton Company, a corporation then doing business at Talladega, Alabama, to the said Entwistle Manufacturing Corporation, and did then and there actually sell and caused to be sold to the said Entwistle Manufacturing Corporation, with like intent and purpose on their part to defraud the said Entwistle Manufacturing Corporation, One Hundred (100) bales of lint cotton, they, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, then and there falsely and fraudulently representing and causing to be represented and pretending the quality and grade of said cotton to be good middling, light tinges, 1 to 1_{16}-inch staple, and falsely and fraudulently representing and causing to be represented and pretending said cotton to weigh Forty Nine Thousand Two Hundred and Thirty-Nine (49,239) pounds; that the false and fraudulent representations made and caused to be made as aforesaid as to the grade and weights of said cotton were false, fraudulent and untrue at the time they were made and caused to be made, and the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham well knew that the said representations and pretenses were false and fraudulent and untrue at the time they were made. The weights, grades and quality

of said cotton as falsely and fraudulently represented and pretended as aforesaid were far superior and in excess of the actual weights, grade and quality of said cotton, and this the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham well knew, and the said false and fraudulent representations and pretenses were made and caused to be made as aforesaid with the intent and purpose on the part of the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, at the time they were made and caused to be made, to defraud the said Entwistle Manufacturing Corporation and for obtaining money from said Entwistle Manufacturing Corporation by means of said false and fraudulent representations and pretenses as aforesaid; and for the purpose of executing said scheme and artifice and attempting to do so, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham did on or about the 23d day of March, 1918, place and caused to be placed in the post office of the United States at Talladega, Alabama, Division and District aforesaid, a certain letter dated March 23d, 1918, 4:05 P. M., and addressed to H. T. Lampkin & Company, at Charlotte, North Carolina, and purporting to be signed Savage Cotton Company per W. A. Savage, General Manager, which said letter is in words and figures as follows:

Codes
Shepperson 78 81 15
Meyers 39

"Savage Cotton Company, Inc.
Cotton.
Talladega, Alabama
March 23d, 1918,
4:05 P. M.

H. T. Lampkin & Company,
Charlotte, N. C.

Gentlemen:

Enclosed herewith find copies of our invoice and Weight Sheets on the 100 B C shipped to Entwistle Mfg. Cor., Rockingham, N. C.

Yours very truly,
SAVAGE COTTON COMPANY, INC.,
Per W. A. Savage, *Gen. Manager.*"

WAS/8Sc

which said letter was to be sent and delivered to said H. T. Lampkin & Company, at Charlotte, North Carolina, by the post office establishment of the United States, and which was in fact so sent and delivered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

COUNT 5. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid, and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together to commit an offense against the United States in violation of Section 215 of the Penal Code in this: that the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together to defraud divers and sundry persons whose names and descriptions are to the Grand Jurors unknown, by devising a scheme and artifice to defraud said divers and sundry persons unknown and for obtaining money from them by means of false and fraudulent pretenses, representations and promises, which said scheme and artifice is set out in Count One of this indictment, to which reference is hereby made, and which said scheme and artifice was to be and was in fact effected and caused to be effected by the use of the mails, and for the purpose of executing said scheme and artifice and attempting to do so the mails and post office establishment of the United States were to be and were in fact used and caused to be used by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy, and S. E. Graham; and for the purpose of effecting the object of the said conspiracy, combination, confederation and agreement, one

or more of the co-conspirators herein named, at the several times and places hereinafter mentioned did and caused to be done certain acts, that is to say:

(1) That the said W. A. Savage, A. M. Savage, and W. O. Wooten on to-wit, the 19th day of March, 1918, drew and caused to be drawn a draft in the sum of Thirty-Two Thousand Seven Hundred Ninety & 88-100 ($327,90.88) Dollars on the Icemorlee Cotton Mills, Monroe, North Carolina, through the Merchants & Farmers Bank, which said draft is in words and figures, as follows:

Savage Cotton Company, Inc.,
Talladega, Alabama.

No. 46 Date 3-19-1918 $32,790.88

3 Days Sight Days after Date

PAY TO THE ORDER OF ISBELL NATIONAL BANK, TALLADEGA, ALA.

A/C— 100 B/C— 49,610#—100 B/C49,752#

THIRTY TWO THOUSAND SEVEN HUNDRED NINETY AND 88-100 Dollars

Value received and charge same to account of

To Icemorlee Mills / Monroe, N. C. / Through Merchants & Farmers Bank.

SAVAGE COTTON COMPANY, INC.
By W. M. George, *Cashier.*,

(2) The said W. A. Savage on to-wit April 1st, 1918, mailed and caused to be mailed in the post office at Talladega, in Talladega County, Alabama, in said Division and District, a certain letter, dated April 30th, 1918, 6:30 P. M., and addressed to H. T. Lamkin & Company, Charlotte, North Carolina, and purporting to be signed by Savage Cotton Company, per W. A. Savage General Manager, which said letter is in words and figures as follows:

Codes Shepperson { 78 81 15 } "Savage Cotton Company, Inc.,
Cotton
Talladega, Alabama,
April 1st, 1918,
6:30 P. M.

Myers 39

H. T. Lamkin & Company,
Charlotte, N. C.
Gentlemen:

We are enclosing herewith our Detailed Weight Sheets and Invoices on 100 B/C shipped to Monroe, N. C., and also 200 B/C shipped to Greensboro, N. C.

Yours very truly,
SAVAGE COTTON COMPANY, INC.,
Per W. A. Savage,
General Manager."

Mr. W. A. Savage
SCC

(3) The said W. A. Savage on to-wit, March 7th, 1918, mailed and caused to be mailed in the post office at Talladega, Alabama, in Talladega County, Division and District aforesaid, a certain letter addressed to J. I. Westervelt & Company, Greenville, South Carolina, purporting to be signed by Savage Cotton Company Per W. A. Savage, Manager, which said letter is in words and figures as follows:

Codes Shepperson { 78 81 15 Myers 39

"Savage Cotton Company, Inc.,
Cotton,
Talladega, Alabama,
March 7th, 1918,
3:30 P. M.

J. I. Westervelt & Company,
Greenville, S. C.
Gentlemen:

Enclosed herewith find copies of our Bill Lading, Invoice and weight sheet on the 100 bales of cotton shipped to Woodside Cotton Mills, Greenville, South Carolina.

Yours very truly,
SAVAGE COTTON COMPANY, INC.,
Per W. A. Savage,
General Manager."

Mr. W. A. Savage,
SCC.

(4) That the said W. A. Savage, on to-wit, March 19th, 1918, drew and caused to be drawn a draft in the sum of Thirty-Three Thousand Five Hundred and Three and 94–100 ($33,503.94) Dollars on the Icemorlee Cotton Mills, Monroe, North Carolina, through the

Farmers & Merchants Bank, which said draft is in words and figures as follows:

Savage Cotton Company, Inc.
No. 47 Date 3-19-1918 $33,503.94
3 Days Sight Days after Sight
PAY TO THE ORDER OF BANK & TRUST COMPANY, TALLADEGA, ALA.
A/C—100 B/C—49.831# —100 B/C 48,710#
THIRTY-THREE THOUSAND FIVE HUNDRED THREE AND 94-100 Dollars
Value received and charge same to account of
To Icemorlee Mills, Monroe, N. C., Through Farmers & Merchants Bank.
SAVAGE COTTON COMPANY, INC.,
By W. M. George,
Cashier.

(5) The said W. A. Savage on to-wit March 19th, 1918, mailed and caused to be mailed in the post office at Talladega, Alabama, in Talladega County, Division and District aforesaid, a certain letter addressed to Icemorlee Cotton Mills, Monroe, North Carolina, purporting to be signed Savage Cotton Company per W. A. Savage, Gen. Manager, which said letter is in words and figures as follows:

Codes 78
Shepperson 81
15
Meyers, 39

"Savage Cotton Company, Inc.,
Cotton
Talladega, Alabama,
March 19th, 1918.
5:00 P. M.

Icemorlee Cotton Mills,
Monroe, North Carolina.
Gentlemen:

Enclosed herewith find our Invoices, Detailed Weight Sheets and Bills Lading on 100 B/C marked FMBC, and 100 B/C marked ICMT, 100 B/C marked PANT, and 100 B/C marked RMFX, all of which are shipped to you at Monroe, North Carolina.

Yours very truly,
SAVAGE COTTON COMPANY, INC.,
Per W. A. Savage,
Gen. Manager."

Mr. W. A. Savage,
SCC.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

COUNT 6. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid, and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together to commit an offence against the United States in violation of Section 215 of the Penal Code in this: The said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together to defraud the Buffalo Manufacturing Company, a business concern, a further description of which is to the Grand Jurors unknown, located at Shelby, North Carolina, by devising a scheme and artifice to defraud said Buffalo Manufacturing Company, and for obtaining money from said company by means of false and fraudulent pretenses, representations and promises, which said scheme and artifice is set out in Count Two of this Indictment, to which reference is hereby made, and which said scheme and artifice was to be effected, and which was in fact effected and caused to be effected by the use of the mails, and for the purpose of executing said scheme and artifice and attempting to do so the mails and post office establishment of the United States were to be used, and were in fact used and caused to be used, by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham; and for the purpose of effecting the object of said conspiracy, combination, confederation and agreement, the said W. A. Savage, one of the defendants herein and co-conspirator, did and caused to be done a certain act, that is to say,

That the said W. A. Savage wrote and caused to be written, and mailed and caused to be mailed on to-wit, the 18th day of March, A. D., 1918, and did on the said 18th day of March, A. D., 1918, mail and caused to be mailed in the post office at Talladega, in Talladega County, Alabama, in said division and district, a certain letter, dated March 18th, 1918, 5 P. M., and addressed to H. T. Lamkin & Company, Charlotte, North Carolina, and purporting to be signed by Savage Cotton Company per W. A. Savage, Gen. Manager, which said letter is in words and figures as follows:

Codes Shepperson 78 81 15 Myers, 39

"Savage Cotton Company, Inc.,
Cotton
Talladega, Alabama,
March 18th, 1918,
5:00 P. M.

H. T. Lamkin & Company,
Charlotte, N. C.

Gentlemen:

Enclosed herewith find our Invoice, Bill Lading, and Detailed Weight Sheet on the 100 B/C shipped to Buffalo Mfg. Company, Stubbs, N. C.

Yours very truly,
SAVAGE COTTON COMPANY, INC.,
Per W. A. Savage,
Gen. Manager."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

COUNT 7. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid, and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together to commit an offense against the United States in violation of Section 215 of the Penal Code, in this: The said D. H. Riddle, W. O.

Wooten, W. A. Savage, M. A. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together to defraud the Entwistle Manufacturing Corporation, a business concern, a further description of which is to the Grand Jurors unknown, located at Rockingham, North Carolina, by devising a scheme and artifice to defraud said Entwistle Manufacturing Corporation, and for obtaining money from said company by means of false and fraudulent pretenses, representation and promises, which said scheme and artifice is set out in Count Four of this indictment, to which reference is hereby made, and which said scheme and artifice was to be effected, and which was in fact effected and caused to be effected, by the use of the mails, and for the purpose of executing said scheme and artifice and attempting to do so the mails and post office establishment of the United States were to be used, and were in fact used and caused to be used by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy, and S. E. Graham; and for the purpose of effecting the object of said conspiracy, combination, confederation and agreement, the said W. A. Savage, one of the defendants herein and co-conspirators, did and caused to be done a certain act, that is to say,

That the said W. A. Savage wrote and caused to be written and mailed and caused to be mailed on the 23rd day of March, A. D. 1918, and did on the said 23rd day of March, A. D. 1918, mail and cause to be mailed in the post office at Talladega, in Talladega County, Alabama, in said division and district, a certain letter, dated March 23rd, 1919, 4:05 P. M., and addressed to H. T. Lamkin & Company, Charlotte, North Carolina, and purporting to be signed by Savage Cotton Company per W. A. Savage, General Manager, which said letter is in words and figures as follows:

Codes
Shepperson { 78 81 15
Myers, 39

"Savage Cotton Company, Inc.
Cotton
Talladega, Ala.
March 23rd, 1918,
4:5 P. M.

H. T. Lamkin & Company,
Charlotte, N. C.
Gentlemen:

Enclosed herewith find copies of our invoice and Weight Sheets on the 100 B/C shipped to Entwistle Mfg. Cor., Rockingham, N. C.

Yours very truly,
SAVAGE COTTON COMPANY, Inc.
Per W. A. Savage,
Gen. Manager."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

ERLE PETTUS,
United States Attorney.

A True Bill
George E. Barlow,
Foreman of the Grand Jury.

Filed in open Court,
Dec. 20, 1919
Chas. J. Allison, Clerk.

MOTION FOR SEVERANCE.

Filed May 4, 1920
Chas. J. Allison, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States
vs.
D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage; T. A. St. John, W. G. Hardy and S. E. Graham

Comes the defendant, D. H. Riddle, in the above styled cause and moves the Court to grant the Defend-

ant—this defendant a trial separate and apart from the other defendants named in the indictment, on the following grounds:

First: For that this defendant is a practicing lawyer in the Courts of Alabama, and in this Court, and did at the period of time mentioned in the Indictment, represent the Savage Cotton Company, a Corporation, as such lawyer, and for that it is not fair to this defendant, nor the other defendants, to require that he be tried by jury under such circumstances, without granting him a trial separate and apart from those whom he had represented as an Attorney.

Second: For that there is much evidence, which will be admissible testimony for and against the other defendants in this case, which would not be evidence for and against this defendant, and for that a joint trial of all these defendants on the charges set out in the Indictment, would thus result in serious injury to the trial of the rights of this defendant, by confusing the evidence against him with the evidence against the other defendants.

Third: For that it is or should be the ultimate purpose of the officials of the Government, prosecuting in this cause, to see that no more than justice is accomplished, and there can be no injury to the Government in the accomplishment of this purpose by giving this defendant a trial, separate from the others, in which his rights can be determined, and his guilt or innocence can be decided, without intruding into a consideration of same, evidence of facts connected with other people and other defendants.

Fourth: This defendant shows to the Court that for a long period of years, to-wit: 20 years, he has been engaged in the practice of law in the State of Alabama, and that during that period of time his civil practice has been confined in a large measure to the trial of cases for individuals and against the large public service corporations. He further shows to the court that during that time he has represented in the courts a large number of plaintiffs who have been injured by the negligence of public service corporations, including railroads, and

has represented the widows, fathers and mothers, and orphans of many men who have been killed while in the performance of their duties for public service corporations, and while passengers on railroads, and that during said period of time he has collected from such public service corporations large sums of money for the benefit of such widows, fathers, mothers and orphans, and that he has built up for himself, in the State of Alabama, a reputation for representing plaintiffs against such public service corporations, largely to the exclusion of other kinds of business, and that, as a result of his said practice in filing hundreds of suits and collecting large sums of money from the large power companies, railroad corporations, and other big, moneyed interests of the State of Alabama, he has brought down upon himself and incurred the enmity and antagonism of such interests, their servants, agents, employees and their friends who can be subordinated to their selfish purposes, including railroads. This defendant further shows to the court that the law of the United States, in order that defendants may obtain for themselves a fair and impartial trial by a jury unprejudiced against such defendant by reason of association, training, business or environment, has provided that such defendant may exercise, without reason therefor, a limited number of strikes; indicted with this defendant is one W. G. Hardy and one S. E. Graham, one of whom is unknown to this defendant, but both of these defendants, at the time of the alleged conspiracy, were working for the large railroad interests, and are now so working, according to the information of this defendant. This defendant further shows to the court that in selecting a jury, in exercising his constitutional rights to be tried by a fair and impartial and unbiased jury, if he is compelled to sacrifice his right of peremptory challenge, and yield to the joint right of said two employees of the large railroad interests, that this defendant will be seriously handicapped.

Wherefore, this defendant D. H. Riddle prays that this court will order a severance and grant defendant

an immediate trial, separate and alone, of the charge set forth in the indictment in this cause.

HUGH BLACK
ROSS BLACKMON
L. H. ELLIS
GEO. PEGRAM RIDDLE,
Attys. for defendant,
D. H. Riddle.

COURT RECORD.

MONDAY, AUGUST 16, 1920.

The District Court of the United States, in and for the Eastern Division of the Northern District of Alabama, met pursuant to adjournment. Present Honorable W. I. Grubb, United States District Judge, Northern District of Alabama, presiding; Honorable Erle Pettus, United States Attorney; H. A. Skeggs, United States Marshal; and Chas. J. Allison, Clerk.

UNITED STATES OF AMERICA,
vs.
D. H. RIDDLE, W. A. SAVAGE,
A. M. SAVAGE, W. O. WOOTEN,
W. G. HARDY, T. A. ST. JOHN,
S. E. GRAHAM.

This cause coming on to be heard this day, come the parties hereto, the United States of America, by United States Attorney, Erle Pettus, cometh also each of the defendants herein in his own proper person, and by counsel, and defendants submit demurrers to the Indictment filed herein against them, and each of them, charging an alleged violation of Sections 37 and 215 of the Penal Code of the United States. After understanding said demurrers, it is ordered by the Court that said demurrers be sustained as to counts one and three of the Indictment, and that said demurrers be overruled as to Counts Two, Four, Five, Six and Seven of the

Indictment. Thereupon, defendants submit a motion for severance as to each defendant, and, after understanding said motion, it is ordered by the Court that the same be and hereby is overruled and denied, to which ruling of the Court, each defendant excepts separately and severally.

Thereupon, the defendants and each of them being arraigned in open court upon the Indictment filed herein against them, they and each of them plead not guilty thereto, and for defense, throw themselves upon their country, as doth also the United States Attorney.

To try this cause come a Jury of good and lawful men duly impaneled, sworn and charged a true verdict to render according to the law and the evidence.

During the introduction of the evidence, the hour of daily adjournment having arrived, it is ordered by the Court that this cause be and the same hereby is continued for further hearing until nine o'clock A. M. to-morrow morning, August 17th, 1920.

TUESDAY, AUGUST 17TH, 1920

ORDER DAILY CONTINUANCE.

WEDNESDAY, AUGUST 18TH, 1920

ORDER DAILY CONTINUANCE.

THURSDAY, AUGUST 19TH, 1920

This being the day and the hour to which this cause was on yesterday continued for further hearing, come again the parties hereto, the United States of America, by United States Attorney, Erle Pettus, cometh also each of the defendants in his own proper person and by counsel, cometh also the Jury heretofore selected, impaneled, sworn and charged to try this cause, and the further hearing of this cause is resumed and begun.

After the introduction of all of the evidence in the case, the argument of counsel on behalf of the United States of America, and on behalf of each of the defen-

dants, separately and severally, and the oral charge delivered by the Court, the Jury retire in charge of an officer of this Court, to consider of their verdict.

Thereupon, the hour of daily adjournment having arrived, and the Jury having this cause under consideration not having as yet agreed upon a verdict, it is ordered, adjudged and decreed by the Court that this cause be and same hereby is continued until 8:30 A. M., August 20th, 1920, for the purpose of receiving the verdict of the Jury in said cause in the event the Jury shall by that time have reached and agreed upon a verdict in this cause.

FRIDAY, AUGUST 20TH, 1920

This being the day and the hour to which this cause was on yesterday continued for the report of the Jury, cometh again the parties hereto, the United States of America, by United States Attorney, cometh also each of the defendants in his own proper person and by counsel, cometh also the Jury heretofore selected, impaneled, sworn and charged to try this cause.

Thereupon, the Jury being inquired of by the Court as to whether or not they have been able to reach a verdict, and the Jury making known to the Court that they have reached and agreed upon their verdict, the Jury return in open Court the following verdict which is read in open Court by the Clerk of this Court, and in the presence of each of the defendants, to-wit:

"We, the Jury, find the Defendants, W. A. Savage, A. M. Savage, W. O. Wooten, D. H. Riddle, T. A. St. John, S. E. Graham and W. G. Hardy guilty as charged under counts 2, 4 and 5 of the Indictment. J. W. McClurkin, Foreman."

Thereupon, motion is made by the defendants that the Jury be polled, which said motion is granted by the Court and each member of the Jury is asked by the Clerk of this Court to state whether or not the above verdict is his verdict, and each member of the Jury states that the above verdict is his verdict, which said

poll of the Jury is taken in open Court and in the presence of each of the defendants and their counsel.

Thereupon, the defendants and each of them being separately and severally inquired of by the Court and showing no good or sufficient cause why sentence should not now be pronounced upon him;

It is ordered, adjudged and decreed by the Court that the Defendant, W. A. Savage, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of One Hundred Dollars on Count Two of this Indictment, and is further sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Hundred Dollars on Count Four of the Indictment, said sentence of imprisonment and confinement under Count Four of the Indictment to commence at the termination of the sentence of imprisonment and confinement imposed upon the defendant, W. A. Savage, under Count Two of the Indictment, and it is further ordered, adjudged and decreed by the court that the defendant, W. A. Savage, be further sentenced, and he hereby is further sentenced, to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Thousand Dollars under Count Five of the Indictment, said sentence of imprisonment and confinement under Count Five of the Indictment to commence at the termination of the sentence of imprisonment and confinement imposed upon the defendant under Count Four of the Indictment; and thereupon it is further

Ordered, Adjudged and Decreed by the court that the defendant, D. H. Riddle, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Hundred Dollars on Count Two of the Indictment, and it is further ordered, adjudged and decreed by the Court that the defendant, D. H. Riddle, be and he hereby is

further sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Hundred Dollars on Count Four of the Indictment, said sentence of imprisonment and confinement under Count Four of the Indictment to commence at the termination of the sentence of imprisonment and confinement under Count Two of the Indictment, and it is further ordered, adjudged and decreed by the Court that the defendant, D. H. Riddle, be and he hereby is further sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of Ten Thousand Dollars on Count Five of the Indictment, said sentence of imprisonment and confinement under Count Five of the Indictment to commence at the termination of the sentence of imprisonment and confinement imposed under Count Four of the Indictment; and thereupon, it is further

Ordered, Adjudged and Decreed by the Court that the defendant, W. O. Wooten, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Hundred Dollars on Count Two of the Indictment, and it is further ordered, adjudged and decreed by the Court that the defendant, W. O. Wooten, be and he hereby is further sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Hundred Dollars on Count Four of the Indictment, said sentence of imprisonment and confinement under Count Four of the Indictment to commence at the termination of the sentence of imprisonment and confinement imposed under Count Two of the Indictment, and it is further ordered, adjudged and decreed by the Court that the defendant, W. O. Wooten, be and he hereby is further sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Thousand Dollars on

Count Five of the Indictment, said sentence of imprisonment and confinement under Count Five of the Indictment to commence at the termination of the sentence of imprisonment and confinement imposed under Count Four of the Indictment; and thereupon, it is further

Ordered, Adjudged and Decreed by the Court that the Defendant, W. G. Hardy, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Thousand Dollars; and thereupon, it is further

Ordered, Adjudged and Decreed by the Court that the defendant, A. M. Savage, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Eighteen Months, and to pay a fine of One Thousand Dollars; and thereupon it is further

Ordered, Adjudged and Decreed by the Court that the defendant, T. A. St. John, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months, and to pay a fine of One Thousand Dollars; and thereupon it is further

Ordered, Adjudged and Decreed by the Court that the defendant, S. E. Graham, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Thousand Dollars.

MOTION TO CORRECT JUDGMENT ENTRY.

Filed September 18th, 1920,
Chas. J. Allison, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

UNITED STATES
v.
D. H. RIDDLE, W. A. SAVAGE, A. M. SAVAGE, W. O. WOOTEN, W. G. HARDY, T. A. ST. JOHN, S. E. GRAHAM. } No. 744

To the Honorable W. I. Grubb, Judge:

Comes the above named D. H. Riddle and respectfully shows unto the Court that in the minute or judgment entry as written up by the Clerk of this Court in the above entitled cause, it is, among other things, stated as follows:

"To try this cause, come a Jury of good and lawful men duly empanelled, sworn and charged a true verdict to render, according to the law and the evidence."

That this entry implies and creates a presumption, if it does not assert, that a jury of twelve men were duly empanelled, sworn and charged a true verdict to render according to the law and the evidence. The said statement in said entry is untrue, the truth being that twelve men were not empanelled as a jury in said cause, but only J. W. McClurkin and ten others, a Jury of eleven men and no more.

And petitioner is advised and believes that altho said cause was tried by a Jury of eleven instead of a Jury of twelve men, as hereinbefore stated, by reason of an agreement or understanding between the District Attorney, representing the United States, and the Attorney for this petitioner, that said cause should be tried by eleven Jurors instead of twelve, which petitioner admits was made and entered into between the Attorneys for the respective parties and agreed to by

petitioner, said record should speak and disclose the truth and show that a Jury of eleven men and not a jury of twelve men were empanelled to try said cause.

Petitioner is further advised that until said minute or judgment entry is corrected and made to disclose what actually transpired on the trial of said cause, said false entry in said judgment will have the effect to deprive this petitioner of his rights guaranteed to him under Section 2, Article III of the Constitution of the United States, and under Article VI of the Amendment thereto, to a trial by a jury of twelve men.

Wherefore, (a) Petitioner prays and moves the Court to amend the said minute or judgment entry, or that the Court will order and direct the Clerk of said Court to amend the minute or judgment entry in this cause by making it disclose that the jury trying said cause was composed of eleven men instead of twelve men and of any facts, agreement or understanding which may be regarded as necessary to explain why said cause was tried by said jury of eleven men instead of twelve men;

(b) Petitioner further prays and moves the Court to strike from the said minute or judgment entry in said cause the following words, where they occur together in said minute or judgment entry viz: "To try this cause come a jury of good and lawful men duly impanelled, sworn and charged a true verdict to render according to the law and the evidence," and substitute in lieu thereof the following as a part of said minute or judgment entry viz: "While the jury was being empanelled to try this cause, it was agreed by and between the District Attorney representing the United States and the Attorneys representing each of the defendants respectively, that this cause should be tried by eleven men only composing the Jury instead of twelve; whereupon, pursuant to said agreement, to try this cause come said Jury of eleven good and lawful men, composed of J. W. McClurkin and ten other only, duly empanelled, sworn and charged a true verdict to render according to the law and the evidence."

(c) This defendant, petitioner, further prays and moves the Court that if said paragraph is not stricken

from the said minute or judgment entry, that said paragraph be amended by said Court to where the same will speak the truth and where it will be made clearly to appear in said minute or judgment entry that the Jury empanelled to try said cause, and which did try said cause and rendered a verdict therein, was composed of eleven men only and not twelve men, to the end that this petitioner may not be deprived of his rights guaranteed him under the Constitution of the United States to a trial by a Jury of twelve men.

LONDON, YANCEY & BROWER,
Attorneys for Petitioner.

STATE OF ALABAMA,)
Jefferson County.)

Personally appeared before the undersigned authority D. H. Riddle, who being by me first duly sworn, deposes and says that he is the petitioner hereinabove named, and that the averments of said petition are true.

D. H. RIDDLE.

Sworn to an subscribed before me, on this 18th day of September, 1920.

[SEAL] OLIVE GREEN, *Notary Public.*

Presented this 18th day of September, 1920.
W. I. GRUBB, *District Judge.*

Motion denied, this 26th day of October, 1920.
W. I. GRUBB, *District Judge.*

COURT RECORD.

UNITED STATES *vs.* D. H. RIDDLE, W. O. WOOTEN, W. A. SAVAGE, A. M. SAVAGE, T. A. ST. JOHN, W. G. HARDY, S. E. GRAHAM.	In Open Court, October 26th, 1920. Honorable W. I. GRUBB, Presiding.

The motion to amend the record of the judgment entry in this cause coming on to be heard, this day, and

the plaintiff appearing by the Honorable Erle Pettus, United States District Attorney, and the defendants all being present in person, and the movant, D. H. Riddle, being present in person and by Attorney, evidence was offered by the movant in support of the motion, and the Court, after hearing the evidence and argument of counsel for the movant, being of the opinion that the record of the judgment entry is as it should be, and does not need amendment, and that the motion is not well taken:

It is ordered and adjudged by the Court that said motion be and is hereby denied; and the movant excepts to the ruling of the Court in this behalf.

MOTION TO SET ASIDE JUDGMENT.

Filed October 26, 1920.
Chas. J. Allison, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

UNITED STATES *vs.* D. H. RIDDLE, W. A. SAVAGE, A. M. SAVAGE, W. O. WOOTEN, W. G. HARDY, T. A. ST. JOHN, and S. E. GRAHAM	No. 744.

Comes the above named D. H. Riddle in the above styled cause, and moves the Court to quash and set aside the judgment heretofore rendered in said cause, and for grounds of said motion, says:

1. The said judgment entry is false.

2. It appears from said judgment entry that the cause was tried and a verdict rendered by a Jury of good and lawful men, which said statement is false in this: That no jury was empanelled in said cause.

3. The verdict on which said judgment is based, was

rendered by eleven men and not twelve men, and is, therefore, void and of no effect.

4. For that the jury which rendered the verdict on which the said judgment is based was composed of J. W. McClurkin and ten others, a jury of eleven men and no more.

5. For that the recital in the said judgment entry "To try this cause come a jury of good and lawful men." is false and deprives this defendant of his constitutional right to a trial by jury.

6. For that the defendant, movant herein, has never been tried by a Jury in said cause.

7. While it appears from said judgment entry that a Jury was empanelled to try said cause, in truth and in fact no jury was ever empanelled, and the defendants were tried in a manner unknown to the law, in that said jury was composed of eleven men only, not twelve, and said judgment of conviction is based solely on a verdict rendered by eleven men and not twelve.

8. For that the verdict and judgment, as it appears in the records of this Court, is a fraud upon the rights of this defendant which said fraud is intended to deprive this defendant of his constitutional rights to a trial by a Jury of twelve good and lawful men as guaranteed him under Section 2, Act 3, 6th Amendment of the Constitution of the United States, when as a matter of fact the alleged Jury which tried said cause and on the verdict of which said judgment is based, was not composed of twelve men, but was composed of only eleven men.

D. H. RIDDLE.

Sworn to and subscribed before me this October the 26th, 1920.

B. S. DORMON, *Notary Public.*

Motion denied, this 26th day of October, 1920.

W. I. GRUBB, *District Judge.*

COURT RECORD.

UNITED STATES,
vs.
D. H. RIDDLE, W. O. WOOTEN,
W. A. SAVAGE, A. M. SAVAGE,
T. A. ST. JOHN, W. G. HARDY,
S. E. GRAHAM.

The motion to set aside the judgment in this cause coming on to be heard, this day, comes the Plaintiff appearing by the Honorable Erle Pettus, United States District Attorney, and the defendants, all being present in person, and the movant, D. H. Riddle being present in person, and by Attorney, evidence was offered by the movant in support of the motion, and the Court, after hearing the evidence and argument of counsel for the movant, being of the opinion that said motion is not well taken:

It is ordered and adjudged by the Court that the motion be and is hereby denied, and that the judgment heretofore entered in this cause, be and is hereby in all things affirmed; and the movant excepts to the ruling of the Court in this behalf.

THE UNITED STATES OF AMERICA }
Northern District of Alabama. }

I, Chas. J. Allison, Clerk of the District Court of the United States for the Eastern Division of the Northern District of Alabama, do hereby certify that the foregoing pages numbered from one (1) to twenty-eight (28) both inclusive, is a full, true and correct copy of the Indictment, Motion for severance, Order on pleadings, Judgment of Conviction and Sentence, Motion to Correct judgment entry, and order denying said motion, and Motion to set aside the judgment, and order denying said motion, in the matter of the *United States of America* vs. *D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham*, as fully as the same appears of record and on file in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, on this the 4th day of November, A. D., 1920.

[SEAL]

CHAS. J. ALLISON,
Clerk U. S. District Court,
Northern District of Alabama.

Supreme Court of the United States

October Term, 1920.

In the Matter
of the
Application of D. H. RIDDLE for a writ of mandamus to HONORABLE W. I. GRUBB, United States District Judge for the Northern District of Alabama, and to the United States District Court for the Eastern Division of the Northern District of Alabama.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION.

This is an application for leave to file a petition for writ of peremptory mandamus, and for rule to show cause why such a writ should not issue, commanding the Honorable W. I. Grubb, Judge of the United States District Court for the Northern District of Alabama, and said United States District Court, to direct and cause the clerk of said District Court for the Eastern Division thereof to amend and correct the minute or judgment entry in the case of *United States* v. *D. H. Riddle, W. A. Savage, M. A. Savage, W. O. Wooten, W. G. Hardy, T. A. St. John and S. E. Graham*, lately tried and now pending in said Eastern Division of said United States District Court, and directing said United States Court and the Honorable W. I. Grubb, as such Judge,

to set aside and vacate the verdict rendered in said cause and the judgment of conviction of D. H. Riddle rendered thereon.

D. H. Riddle and his co-defendants were duly indicted by the grand jury in the United States District Court for the Eastern Division of the Northern District of Alabama and were duly arraigned and pleaded not guilty and the trial of said Riddle and his co-defendants was entered upon, and the said court thereupon began to organize a jury for the trial of Riddle and the other defendants on said indictment. After eleven jurors had been drawn and accepted, as qualified jurors in the trial of said indictment, the original panel of jurors summoned to said court was found to be exhausted, and thereupon the court ordered the Marshal of the court to summon from the by-standers six other jurors to serve as talesmen, and said talesmen were summoned as directed. Before any one of said talesmen was called on to qualify as a juror, the court was informed that an oral agreement had been made and entered into by and between the District Attorney and the attorneys for the defendants that said cause should be tried by the eleven jurors then in the box, and no more. Thereupon, all of said talesmen were excused and the said eleven jurors and no more, constituting the jury, were duly sworn and empaneled to try the cause and the cause was so tried from the beginning to the end by said jury consisting of eleven jurors, and no more.

Said jury of eleven men reported that they had agreed upon a verdict and the verdict was "guilty" as to petitioner and his co-defendants on counts 2, 4 and 5 of the said indictment, and thereupon the court entered a judgment sentencing petitioner to imprisonment in the penitentiary in Atlanta, Georgia, for an aggregate term of

three years and three months, and payment of fines amounting in the aggregate to $10,200.00.

In writing up the minute or judgment entry of said trial, the clerk of said court did not state that the cause was tried by a jury consisting of eleven men only, but wrote said minute so as to show that "came a jury of good and lawful men," thereby stating or implying that a jury of twelve men was duly sworn and empânelled to try said cause. Thereafter on the 18th day of September, 1920, during the term of said court at which said verdict was rendered and judgment entered, petitioner presented to the Honorable W. I. Grubb, Judge of said court, a verified petition praying that the clerk be directed to amend the minute entry by making it disclose and recite that the jury trying said cause was composed of eleven men only. Judge Grubb aforesaid noted on said petition that same had been presented, and the hearing thereof was passed until the 26th day of October, 1920, when the petition, at an adjourned session of said United States District Court for the Eastern Division of the Northern District of Alabama, at Anniston, was called for hearing, with his Honor Judge Grubb presiding, and petitioner and all of his co-defendants was present in court and the United States was duly represented by Erle Pettus, District Attorney.

To said petition no demurrer, plea or answer was filed by or on behalf of the United States or anyone else. Altho the facts alleged in said petition were not denied, but were known to his Honor Judge Grubb to be true as stated, petitioner offered to establish the facts alleged in his petition, but objection was made to such evidence by the District Attorney and sustained by the court, and no evidence as to the number of jurors sworn

and empanelled to try said cause was admitted or heard.

It was shown by the uncontradicted testimony of H. A. Skeggs, marshal of said District, and C. J. Allison, clerk of said court, that there are no records kept by either of said officials showing the number of jurors who served on the trial of said cause.

Thereupon on said 26th day of October, 1920, the said District Court made and entered an order denying said petition.

Point I.

The offense described in the indictment, upon which petitioner and his co-defendants were tried and convicted, is a felony.

U. S. Comp. Stat. 1918, Sec. 10509.
Criminal Code U. S. Sec. 335.

Point II.

In the Federal Courts the trial of all crimes must be by an impartial jury; and the jury which the Constitution prescribes for the trial of crimes must, as at the common law, consist of twelve jurors, no more and no less.

Constitution Art. III, Sec. 2, Amendment VI.
Rasmussen *v.* U. S. 197 U. S. 516.
Thompson *v.* Utah, 170 U. S. 343, 349.
2 Hales P. C. 161.
1 Chitty's *Criminal Law*, 505.
2 Blackstone, 719.
Coke, Elizabeth 654.
Schieck *v.* U. S. 195 U. S. 65.

In Alabama a jury of twelve is required for the condemnation of private property to public use, notwithstanding the condemnation statute provides a six-men "jury."

Woodward Iron Co. *v.* Cabaniss, 87 Ala. 328.

Point III.

One accused of felony is without the power to consent that the jury in the trial thereof may consist of less than twelve jurors, and a verdict rendered by a jury of less than twelve is invalid notwithstanding the consent of the defendant.

Thompson *v.* Utah, *sup.* p. 353.
Hopt *v.* Utah, 110 U. S. 574, 579.
Gius *v.* U. S. 141 Fed. 956.
Dickinson *v.* U. S. 159 Fed. 801.
Cancemi *v.* People, 18 N. Y. 128.
Hill *v.* People, 16 Mich. 351, 357.
Bell *v.* State, 44 Ala. 393.
Cooley's *Constitutional Limitations* (7th Ed. 1903) 452, 459.
Allen *v.* State, 54 Ind. 461.
State *v.* Simons, 60 Pac. (Kas.) 1052.
State *v.* Ellis, 60 Pac. (Wash.) 129.
Forsyth's *History of Trial by Jury*, p. 421.
Thompson on Trials, Vol. 1, p. 6, Par. 6.
31 Cent. Dig. "Jury" 201.

Point IV.

It is not only the right, but the duty of the court, to so correct and amend its records as to make them a true and perfect transcript of whatever occurred that belongs to the record.

Perry *v.* Adam, 83 N. C. 266.
King *v.* State Bank, 90 N. C. 735.
47 Am. Dec. 739.
10 Fed. 710–11.
6 Mass. (Cush.) 282.

Point V.

It is a general rule of law that all judgments, however conclusive in their character, are under the control of the court which pronounces them during the term at

which they were rendered, and may be set aside, modified or vacated by the court.

Bronson *v.* Schulten, 104 U. S. 410.
Cancemi *v.* People, *sup.*

Point VI.

Where no plea or denial controverting the allegations of the petition is filed, there is no issue but the facts alleged are admitted.

White *v.* Emblem, 28 S. E. 761, 762.
Seller *v.* Jenkins, 97 Ind. 430, 438.
Riggs *v.* Chapin, 7 N. Y. Supp. 765, 767.

Point VII.

The United States having appeared on the hearing of petitioner's petition and motion in the District Court, and filed no demurrer, plea or answer, petitioner was entitled to a judgment *nil dicit.*

Grigg *v.* Gilmer, 54 Ala. 425, 430.
Simmons *v.* Fitche, 102 Ala. 317.
Washington County *v.* Porter, 128 Ala. 278.

Point VIII.

In the absence of all evidence tending to controvert the averments of the petition, the District Court was without authority to render a judgment overruling the same.

Allen *v.* State, 162 Ala. 74.
Walker *v.* State, 86 So. Rep. 257.
U. S. *v.* Brockley, 266 Fed. 1001. (Fed. Rep. Ad. Sheets, Nov. 11).
Robertson *v.* Perkins, 129 U. S. 233.
5 Ency. Dig. Ala. Rep. p. 551, Sec. 141.
Smilie *v.* Siler, 35 Ala. 88.

Point IX.

A finding of a trial court is not conclusive in this court if it appears that there was no evidence to support it.

Postal Telegraph Co. *v.* Newport, 247 U. S. 464, 473.
Carlson *v.* Curtiss, 234 U. S. 103, 106.
North Carolina R. R. *v.* Jackson, 232 U. S. 259.
Ward *v.* Joslyn, 186 U. S. 142

Point X.

This court will analyze the facts to determine whether what purports to be a finding of fact is so interwoven with a question of law as to be a decision of the latter.

Norfolk & Western R. R. Co. *v.* West Virginia, 236 U. S. 605, 610.
Southern Pacific Co. *v.* Schuyler, 227 U. S. 601, 611.
Oregon *v.* Fairchild, 224 U. S. 510, 528.

Point XI.

Mandamus is the proper remedy.

Virginia *v.* Rives, 100 U. S. 313.
Ex Parte Connoway, 178 U. S. 421.
Ex Parte Barclay, 74 U. S. 364.
Henderson *v.* Parker, 156 U. S. 277.

Point XII.

This court has the exclusive jurisdiction to issue the writ of mandamus prayed for.

Whitney *v.* Dick, 202 U. S. 132.
United States *v.* Mayer, 235 U. S. 55.
Corlli *v.* People, 32 N. Y. 720.

If the United States, having failed to traverse the petition for correction of the record, had the right to submit evidence, it nevertheless submitted none; and

so the case now brought to this court is utterly void of proof that the jury which convicted petitioner was composed of twelve men. This court, when it "analyzes the facts," will determine that the ruling of Judge Grubb denying the petition was purely a decision of a question of law. For the present purpose (the making of a true record) petitioner's sole recourse is to this court; and the only remedy here is by mandamus.

BENJAMIN CARTER,
Attorney for Petitioner.

LONDON, YANCEY & BROWER,
Of Counsel.

LE COPY

Office Supreme Cou
FILED
FEB 28 19
JAMES D. MA

No. 27, Original.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

IN THE MATTER OF THE APPLICATION OF D. H. RUDDLE FOR A WRIT OF MANDAMUS TO HON. W. I. GRUBB, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ALABAMA, AND TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR PETITIONER.

BENJAMIN CARTER,

JOHN LONDON,

Attorneys for Petitioner.

LONDON, YANCEY & BROWER,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

IN THE MATTER OF THE APPLICATION of D. H. Riddle for a writ of mandamus to Hon. W. I. Grubb, United States district judge for the Northern District of Alabama, and to the United States District Court for the Eastern Division of the Northern District of Alabama.	No. 27, Original.

BRIEF FOR PETITIONER.

To a rule of this court upon the petition, seeking the issue of a writ of mandamus, a return has been made which does not deny that this remedy is proper and does not raise any issue of fact. In reality the return is no more than a re-statement of facts laid in the petition. The petition stands, therefore, as would a declaration in an ordinary suit coming to be heard on demurrer.

The issues are:

(1) Does the Federal Constitution prescribe for the trial, in a Federal Court, of one indicted for a felony, a jury of twelve men.

(2) Can the requirement of a jury of twelve be waived by the defendant in such a case.

Convenience and clarity in the argument will be promoted by a brief conspectus of decisions rendered by this court, defining the scope of Section Three and Amendments Five, Six and Seven and Fourteen to the Constitution of the United States, in relation both to a jury (its constitution and necessity) and to various other elements of a trial for a criminal offense—the appeal to the Constitution being upheld in some of the decisions and denied in others: These decisions in their substance, will be stated mainly in chronological order:

Except in regard to petty offenses the guaranty of an impartial jury in a criminal prosecution, conducted under authority of the United States, invalidates an original trial by a judge without a jury notwithstanding that there is a right of appeal to a court having a constitutional jury, *Callan v. Wilson*, 127 U. S. 540.

Due process of law forbids that an accused person be tried before a plea of not guilty is entered. *Crain v. United States*, 162 U. S. 625.

A "jury" as understood at common law and as used in our constitutions, Federal and State, signifies twelve men impanelled in the case to be tried, a less number is not a jury. A defendant, upon pleading not guilty, must

be tried by a jury of twelve men and he can not waive such a jury, *Thompson v. Utah*, 170 U. S. 343, *State v. Rogers, et al*, 162 N. C. 656, *Cancemi v. People*, 18 N. Y. 128, *Wilson v. State*, 16 Ark. 601, *Bell v. State*, 44 Ala. 393, *State v. Beebe*, 120 La. 493.

Article III and Amendment Six of the Constitution do not forbid the waiver of a jury in a trial for a petty offense. *Schick v. United States*, 195 U. S. 65.

In a territory incorporated into the United States in pursuance of a treaty by which the United States acquired possession and sovereignty the constitutional guaranties obtain and Congress did not have the power to deny trial by a common-law or jury of twelve to a person accused of a misdemeanor. *Rasmussen v. United States*, 197 U. S. 516.

Exemption of an accused person from self-incrimination though secured as against federal action by the Fifth Amendment of the Constitution, is not a fundamental right of national citizenship, and is not safeguarded against State action by the Fourteenth Amendment. *Twining v. New Jersey*, 211 U. S. 78.

The Philippine Bill of Rights and Amendment Six of the Constitution do not invalidate a trial of a prisoner, at large on bail, when, having been present at the commencement of the trial, he voluntarily absents himself from the later proceedings. *Diaz v. United States*, 223 U. S. 442.

The constitutional right to "a trial by jury" in a criminal case in the Federal Court means a trial by

twelve men presided over by one judge, all of whom must remain identical from the beginning to the end. It is not possible for either the Government or the accused, or for both, to consent to the substitution either of one judge for another or one juror for another. *Freeman v. United States*, 227 Fed. 732.

It has been long and conclusively settled that the Seventh Amendment exacts a trial by jury according to the course of the common law. *Minneapolis & St. Louis R. R. v. Bombolis*, 241 U. S. 211.

A Common Law Jury Is Peculiarly Demanded by the Adjudications.

In *Twining v. New Jersey, sup.*, rested by this Court on the *Slaughter House Cases*, the court said (211 U. S. 96):

> "There can be no doubt, so far as the decision in the Slaughter-House Cases has determined the question, that the civil rights sometimes described as fundamental and inalienable, which before the war amendments were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the Fourteenth Amendment. Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others. * * * But we need not

now inquire into the merits of the original dispute. This part at least of the Slaughter-House Cases has been steadily adhered to by this court."

The matter there under review was self-incrimination of the defendant upon a trial in a State court for a misdemeanor; and it was pointed out, by reference to other decisions, that the right to a common law jury in state courts stood upon the same ground. Protection of the citizen in these matters, and some others, was preserved by the eight first amendments to the Constitution wherever a Federal power was in question, and the Fourteenth Amendment, which demands of the states "due process of law" has no application to privileges and immunities which although fundamental, do not arise out of the nature and character of the National Government. Nothing was said to suggest any narrow interpretation of the Sixth Amendment, which is the guaranty of a jury trial in a Federal Court. The decision turned upon the distinction between the incidents and immunities of state citizenship on the one hand and Federal citizenship on the other hand. There was no reference to *Thompson v. Utah, supra,* and nothing to suggest any diminution from its weight as authority.

The offense (grand larceny) with which Thompson v. Utah was concerned had been committed when Utah was a territory, but the trial occurred after its admis-

sion as a state, and one of the issues was whether the trial by eight jurors, as authorized by the statutes of the state, was legal; and this court (170 U. S. pp. 349 and 351) said:

> "Assuming that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions, apply to the territory of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale's P. C. 161, 1 Chitty Cr. Law 505. This question must be answered oin the affirmative."
>
> * * * * * * *
>
> "When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him, except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a state could deprive him of his liberty by the concurrent action of a court and eight jurors, would recognize the power of the state not only to do what the United States, in respect to Thompson's crime, could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offense was committed."

Diaz v. U. S., supra, is peculiar in that, the defendant being on trial for a felony but being at large on bail,

his presence at the concluding stage of the trial was held not to be any more indispensable than it would have been in the case of a misdmeanor charge. The distinction drawn was between (1) a felony, with the defendant in custody, or a capital offense and (2) any charge, of non-capital character, when the defendant was at liberty to go and come. It seems safe to say this distinction has not been made explicitly in any of the earlier cases. The line was always drawn in those cases between a "felony," or a "crime," or a "disgraceful charge," and a "misdemeanor," or a "trivial charge."

The reasoning of the decision in the Diaz case would hardly apply to other immunities which were held by the early decisions to be guaranteed by one or another of the amendments to the Constitution. This would appear from the text of the decision itself, and the distinction between the case reviewed and the matter of a trial in a federal court by a common law jury is especially made clear. The court refers (p. 458) to *Hopt v. Utah*, 110 U. S. 574; *Lewis v. U. S.*, 146 U. S. 370; *Schwab v. Berggren*, 143 U. S. 442, and *Thompson v. Utah*, 170 U. S. 343 in order to say that they are not in conflict with what it is there deciding. It is pointed out that while two of those cases were concerned with absence of the defendant from the trial, this was forbidden by statute in the one case, and was the subject of an exception taken in the other case, and this follows: "The other two cases are even

less in point." Of *Thompson v. Utah* (after comment on the third case) it is said: "The question was, whether, when the applicable law contemplated that the accused should be tried before a tribunal composed of a court and a jury of twelve men, he could by his silence or consent authorize a tribunal differently composed, and not recognized by law to try him; and it was held that he could not." (pp. 458, 459.)

The very succinctness of this treatment of *Thompson v. Utah* would indicate its finality—the indisposition of the court to give serious consideration to any question touching the matter which had there been decided. It is not surprising that in *Minneapolis & St. Louis R. R. v. Bombolis, supra,* this court said the necessity of a trial by a jury according to the course of the common law has been "so long and so conclusively settled" as not to leave open to question the repugnance of the state's statute to the Federal Constitution.

The other cases cited above, relating to other elements of a jury trial, also indicate by their reasoning and by their silence upon that one question, a settled view of this court that a jury of twelve men is a *sine qua non* in a felony case tried in a Federal court.

As it happens, the effect of an attempted waiver by defendant of a common-law jury is the subject of peculilarly exhaustive discussion in some of the decisions of

the state courts. In regard to the weight to be given to such decisions by Federal courts, the United States Circuit Court of Appeals in Freeman v. United States (227 Fed. 746) said:

> "While the constitutional provisions of the states have no application to trials in the federal courts for offenses committed against the United States, they are nevertheless interesting as showing the deep-seated conviction of the people of the various commonwealths that the life and liberty of the citizens of this country should be protected by the courts against forfeiture except in accordance with the established principles of law which cannot be waived by the voluntary action of the individual."

In State v. Beebe supra (120 La. 493), although the State Constitution provided for a jury of five in such cases (not involving hard labor as punishment) the defendant was tried, without his objection, by a jury of twelve. On his appeal the Supreme Court of the State said:

> "The tribunal before which the accused was tried was therefore without jurisdiction in the premises, and as to him and his case is as though it did not exist. * * * If it be said that the defendant by failing to object to his trial by a jury of twelve

waived his right to be tried by a jury of five, the answer is that the constitution provides that he shall be tried by a jury of five, unless he waived that right, and in the event of such waiver the District Judge shall have authority to try him, but it no more confers that authority upon a jury of twelve than upon a jury of three or a mob of fifty." * * * "In State v. Thompson, 104 La. 167, it was held that: Parties accused of crime necessarily punishable at hard labor, have no legal right to waive trial by a jury and insist upon being tried by the District Judge; the reason assigned by the District Court for refusing to permit the accused to waive the jury being that the state has an interest in the preservation of the lives and liberties of its citizens and will not allow them to be taken away without due process of law. In State v. Ned, 105 La. 696, this court said: 'The constitution requires that * * * the accused should be tried by twelve men. He could not waive this requirement'."

In the Rogers case, 162 N. C. 656, the court, while deciding the jury question, touched on features of a common law trial which were deemed *not* to be indispensable in a strict sense. The court's conclusion is thus expressed (p. 869):

"A jury, as understood at common law and as used in our Constitutions, Federal and State, signi-

> fies twelve men duly empanelled in the case to be tried. A less number is not a jury. * * * A defendant may plead guilty, or *nolo contendere*, or *autrefois convict*, and of course the empanelling of a jury is unnecessary; but when he pleads not guilty in cases where a trial is guaranteed by the organic law, he must be tried by a jury of twelve men, and he cannot waive it."

If a common law jury is prescribed for a trial in a state court it is by the state constitution or by the Fourteenth Amendment to the Federal Constitution. In a Federal Court the mandates for such a jury are Article III and the Sixth Amendment of the Federal Constitution. If the ultimate question is the effect of the defendant's waiving a jury, state cases and Federal cases would seem to be on an absolute parity, and so it is assumed that the final decision of the state courts on this question will be regarded in this court as pertinent and as entitled to great respect.

The state cases cited rest upon a principle which has been recognized, in one way or another, in the Federal cases already cited and in some others. Thus in *Hopt v. Utah*, 110 U. S. 574 (579), this court, referring to its conclusion that the personal presence of the accused person at the trial could not be dispensed with, said:

"The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life,, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law."

The Trial Court's Record Is Open to Correction.

It is manifest that upon the record of the District Court this petitioner, taking the case to the Court of Appeals for review, could not raise the question that he was tried by a jury of less than twelve men. An obvious corollary is that the record should be made to state what actually occurred. Not often has this proposition been so questioned as to invoke rulings of appellate tribunals. There are adjudications, however, closely in point.

In the Cancemi case *supra* the trial court corrected its record by a *postea* to show that the jury was consti-

tuted of only eleven men, and this action was approved by the appellate court. (18 N. Y. 134.)

In *People v. Walker,* 64 Pac. 133, a motion was made in the trial court under a statute of the State of California, authorizing appeal from any order made after judgment affecting any substantial rights of the parties, to correct a minute entry which, as written, falsely implied that the requirements of the statutes of that state, in respect to the rights of the defendant, had been complied with. The motion was overruled and on appeal the Supreme Court said:

> "If a sentence is pronounced without a substantial compliance with these requirements and the clerk entered upa judgment upon a stero-typed form, showing full compliance, certainly the court has power to correct its minutes upon a proper application, and it ought to do so. * * *
>
> No question has been raised by counsel for the people as to the right to appeal from this order, but the question suggests itself and has been considered. We think the orders were appealable. They were made after final judgment. They affected substantial rights of defendant, and the errors to which the motion were directed could not have been reviewed on appeal from the judgment. * * *
>
> The only possible means by which he can save

an exception to an order of this character is by making a motion after judgment based upon a showing of the facts."

And after referring to the Section of the penal code before referred to, the court said:

"Under that provision and under that alone can a record be secured in such cases, upon which the errors of the trial court may be reviewed."

BENJAMIN CARTER,

JOHN LONDON,

Attorneys for Petitioner.

LONDON, YANCEY & BROWER,

Of Counsel.

COPY

[redacted]

No. 97, Original.

[redacted]

[redacted] Court of the United States.

[redacted] Term, 1909.

[redacted] Matter of the Application of D. H. Bowles for a Writ of Mandamus to Hon. W. I. Grubb, District Judge, Designated to Hold the Northern District of Alabama, and to the United States District Court for the Eastern Division of the Northern District of Alabama.

PETITION FOR WRIT OF MANDAMUS TO JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

[redacted] FOR THE RESPONDENT.

[redacted]

INDEX.

	Page.
THE CASE	2
QUESTION INVOLVED	4
BRIEF	4
I. The complaint is not that the judge has refused to act, but that he has acted erroneously	4
II. The substance of the judgment below is that, in view of the circumstances, the record entry correctly states the facts	5
III. If the judgment rendered on the petition by the court below was erroneous, the petitioner had a plain and simple remedy by writ of error	6
IV. The petitioner is not entitled to a writ of mandamus to serve the same purpose which would be served by a writ of error	8

CASES CITED.

Ex parte Abdu, 247 U. S. 27	17
Ex parte American Steel Barrel Co., 230 U. S. 35, 45–46	15
Ex parte Brown, 116 U. S. 401, 402	13
Ex parte Burtis, 103 U. S. 238	11
Ex parte First National Bank, 228 U. S. 516, 518	14
Ex parte Harding, 219 U. S. 363	13
Ex parte Many, 14 How. 24, 25	10
Ex parte Morgan, 114 U. S. 174, 175–176	12
Ex parte Newman, 14 Wall. 152, 165	10
Ex parte Park Square Automobile Station, 244 U. S. 412, 415	15
Ex parte Peterson, 253 U. S. 300, 305–306	18
Ex parte Roe, 234 U. S. 70, 73	15
Ex parte Simons, 247 U. S. 231, 239–40	16
Ex parte Taylor, 14 How. 3, 12–13	10
Ex parte Wagner, 249 U. S. 465, 471	15
Ex parte Whitney, 13 Pet. 404, 408	9
In re James Pollitz, 206 U. S. 323, 331	13
United States v. *Judge Lawrence*, 3 Dall. 42, 53	8

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

IN THE MATTER OF THE APPLICATION OF D. H. Riddle for a writ of mandamus to Hon. W. I. Grubb, United States District Judge for the Northern District of Alabama, and to the United States District Court for the Eastern Division of the Northern District of Alabama. } No. 27, Original.

PETITION FOR WRIT OF MANDAMUS TO JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR THE RESPONDENT.

This case is here on a rule previously made to show cause why the writ of mandamus should not issue against the Hon. W. I. Grubb, United States District Judge for the Northern District of Alabama, to require him to cause the minute entry or judgment entry in a criminal case to be amended so as to show that the jury which tried the case consisted of only eleven jurors.

THE CASE.

The case, as made by the petition filed in this court and the copy of the record in the court below, attached thereto, is this:

The petitioner and others were indicted for a violation of section 215 of the Penal Code, and in August, 1920, were convicted and given penitentiary sentences in addition to fines.

When the case came on to be tried there was difficulty in securing a jury. Only 11 jurors had been secured when the list of those summoned for jury service was exhausted. The presiding judge, however, ordered other jurors to be summoned. This was done, and six of those so summoned were found to be duly qualified. At this stage of the proceedings, however, pursuant to an agreement between the United States district attorney and the attorneys representing the defendants, the additional 6 jurors were not called, but the case proceeded and was tried by a jury consisting of the 11 selected from the original list. (Rec., pp. 2–3.) While the petition filed in this court simply states that this agreement was made by the attorneys in the case, it was expressly stated by the petitioner, in the petition which he filed in the court below, and which is a part of the record exhibited with his petition in this court, that he was personally a party to the agreement. (Rec., pp. 49–50.)

In pursuance of this agreement, the names of the jurors were not set out in the minute entry, which was as follows:

> To try this cause come a jury of good and lawful men duly empaneled, sworn and charged a true verdict to render according to the law and the evidence. (Rec., pp. 4, 44.)

The verdict was returned and sentence imposed August 20, 1920. On September 18 the petitioner filed with the clerk of the court a petition addressed to the presiding judge praying that the minute entry above quoted be amended so as to show that the jury was composed of only 11 men, together with any agreement or understanding which may be regarded as necessary to explain why said cause was tried by said jury of 11 men instead of 12 men. (Rec., pp. 49–50.) There was a hearing on this petition on October 26, 1920, and the court made the following order:

> The motion to amend the record of the judgment entry in this cause coming on to be heard this day, and the plaintiff appearing by the Honorable Erle Pettus, United States district attorney, and the defendants all being present in person, and the movant, D. H. Riddle, being present in person and by attorney, evidence was offered by the movant in support of the motion, and the court after hearing the evidence and argument of counsel for the movant, being of the opinion that the record of the judgment entry is as it should be, and does not need amendment, and that the motion is not well taken:
>
> It is ordered and adjudged by the court that said motion be and is hereby denied;

and the movant excepts to the ruling of the court in this behalf. (Rec., pp. 51–52.)

The petition filed in this court complains that evidence offered in support of this motion was, on objection made by the district attorney, excluded, and that the court erroneously refused to amend the record entry.

QUESTION INVOLVED.

The question involved is whether the judgment of the district court declining to amend the minute entry can be reviewed and the error, if any, corrected by the writ of mandamus, and the district judge ordered to cause the minute entry to be put in such form as this court may adjudge proper.

BRIEF.

I.

The complaint is not that the judge has refused to act, but that he has acted erroneously.

It will be seen from the foregoing statement that, with respect to the matter in dispute, the district judge has not refused to act. The complaint, on the contrary, is that he has acted, but that his action was erroneous. The matter was formally presented to him, as the presiding judge, by a petition. He took jurisdiction and entertained the petition, on which there was a formal hearing. He then entered a judgment, declining to grant the prayer of the petition. The only complaint is that he erroneously excluded evidence offered and reached an erroneous

conclusion. If he had declined to entertain the petition or to render any judgment upon it, the writ of mandamus might have been the proper remedy to require him to act. If that had been the case, however, this court would not have directed him to grant the relief sought, but merely to entertain the petition and decide the issue according to his own judgment, leaving the petitioner to pursue the proper remedy in the event that judgment was erroneous.

II.

The substance of the judgment below is that, in view of the circumstances, the record entry correctly states the facts.

The record, as presented by the petitioner, makes plain the action of the court and the reason therefor. The contention presented was that the minute entry should affirmatively show that the jury consisted of only 11 men. It is complained that, in the hearing of the petition, the judge, sustaining the objection of the United States district attorney, declined to admit evidence of this fact. The case, according to the petition filed in this court, had proceeded to trial before a jury composed of 11 men by virtue of an agreement to that effect entered into by the petitioner himself. And it is a fair inference that the agreement was to the further effect that the jury so composed should be treated by the court as a lawful jury. This would imply that the record should simply show a trial by a lawful jury. The minute

entry made no misstatement of fact. It merely recited "a jury" of good and lawful men. The question presented to the district judge was whether a jury agreed to in the manner shown was a jury regardless of whether it was composed of 12 or 11 men. His view obviously was that such a jury was a lawful jury, and therefore it was utterly immaterial whether it was composed of 12 or 11 men. Entertaining this view, he very properly declined to hear evidence on that question. The question now is not whether this view was erroneous, but whether, if so, mandamus is available as a remedy. He had jurisdiction of the case and of the petition which sought to have the record amended. The petition called for the exercise of judgment. He did not refuse to exercise this judgment, but acted judicially upon the petition and rendered his judgment.

III.

If the judgment rendered on the petition by the court below was erroneous, the petitioner had a plain and simple remedy by writ of error.

As we have seen, the petitioner's complaint is that he was not accorded his right to be tried by a jury of 12 men and that the minute entry failed to show this fact. The entry, as it stands, in no way embarrassed his right to have his alleged constitutional right passed on by an appellate court. The minute entry showed merely that he had been tried by a jury of good and lawful men. He had called in question the correctness of this entry by asserting in his peti-

tion the fact that the jury consisted of only 11 men. On this he had invoked the judgment of the court, which was adverse to him, being, in substance, that the jury was a lawful jury under the circumstances, whether composed of 12 or only 11 men. For this reason, evidence offered by him as to the number of men composing the jury had been excluded, and he had excepted to this action. If he desired a review of the case, in order to assert his alleged constitutional right, all he had to do was to sue out a writ of error and tender to the district judge a bill of exceptions, stating truly everything material that had occurred from the beginning to the end of the trial. If his petition in this case gives a true history of what occurred, his bill of exceptions would have contained the express agreement made in open court under which the case was to be tried by a jury of 11 men, and also the fact that it was so tried. The same bill of exceptions would have shown that, on his petition to amend the record, he offered to prove the fact and was not permitted to do so. On a trial in the appellate court, with this bill of exceptions, that court would have been called upon to determine whether, in view of his agreement, he had been denied any constitutional right, or, if it was necessary to amend the record, whether the judge was in error in overruling his petition to that effect. In other words, every question which he now seeks to make in this court could have been made in a trial on writ of error, with a proper bill of exceptions. Of course, if he had

tendered a bill of exceptions, setting out the agreement made in open court, and his offer of evidence in support of his petition to amend the record, and the judge, though admitting the facts to be correctly stated, had declined to sign the bill of exceptions, he would have been entitled to the writ of mandamus to require it to be signed. This was not done, however, and no contention is presented here which could not have been just as readily presented in the ordinary way by prosecuting a writ of error.

IV.

The petitioner is not entitled to a writ of mandamus to serve the same purpose which would be served by a writ of error.

This court has always held that mandamus can not be used to perform the function of a writ of error or an appeal or to direct *how* a judge shall decide a matter within his jurisdiction.

In *United States* v. *Judge Laurence* (1795), 3 Dall. 42, 53, the French consul had applied to the district judge for a warrant for the arrest of a deserter under the consular convention with France. The judge refused the warrant on the ground that the consul did not furnish the particular formal evidence required by the convention to the point of service in the French army. Thereupon the United States applied for a mandamus, in refusing which the court said:

> We are clearly and unanimously of opinion that a *mandamus* ought not to issue. It is evident that the district judge was acting in

> a judicial capacity when he determined that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre; and (whatever might be the difference of sentiment entertained by this court) we have no power to compel a judge to decide according to the dictates of any judgment but his own.

In *Ex parte Whitney* (1839), 13 Pet. 404, 408, the trial judge insisted that the procedure on a bill in equity should be according to the rules established in his court and not according to the rules established by this court. An application for a mandamus to compel him to proceed according to the latter was denied, the court saying:

> But the question before us is not as to the regularity and propriety of those proceedings, but whether the case before us is one in which a mandamus ought to issue. And we are of opinion that it is not such a case. The district judge is proceeding in the cause, however irregular that proceeding may be deemed; and the appropriate redress, if any, is to be obtained by an appeal after the final decree shall be had in the cause. A writ of mandamus is not the appropriate remedy for any orders which may be made in a cause by a judge in the exercise of his authority; although they may seem to bear harshly or oppressively upon the party. The remedy in such cases must be sought in some other form.

In *Ex parte Taylor* (1852), 14 How. 3, 12, 13, a mandamus to compel the trial judge to accept bail in the amount fixed by statute was denied.

In *Ex parte Many* (1852), 14 How. 24, 25, a judgment had been entered in favor of plaintiff for a certain amount with costs, but the amount of the costs was left blank. On affirmance by this court and return to the trial court, the plaintiff moved to amend the record so as to insert the amount of the taxed costs, and on denial of this motion sought a mandamus from this court, which said:

> The decision of the circuit court was not a mere ministerial act. It was the decision of a court of competent jurisdiction, made in the exercise of judicial authority and discretion. This court might unquestionably issue a *mandamus* to the court below to proceed to judgment. But in this case the court has proceeded to judgment upon the question submitted for its decision. And whether that judgment be erroneous or not, this court has not jurisdiction to reexamine it in a proceeding by *mandamus*.

In *Ex parte Newman* (1871), 14 Wall. 152, 165, 166, where the lower court refused to take jurisdiction and there was no right to writ of error or appeal this court said:

> Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or

> where such a court, having heard the cause, refuses to render judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate court is to direct the performance of a ministerial act or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervisory court will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.

In *Ex parte Burtis* (1880), 103 U. S. 238, a motion was made to the trial court to compel the production and use of certain testimony which was denied. In refusing a mandamus this court said:

> The district judge took jurisdiction of the matter, as it was his duty to do, heard the parties, and decided adversely to the claim of the petitioner. In this he may have done wrong, and the reasons he has assigned may not be such as will bear the test of judicial criticism; but we can not, by *mandamus*, compel him to undo what he has thus done in the exercise of his legitimate jurisdiction.

In *Ex parte Morgan* (1884), 114 U. S. 174, 175, 176, a motion was made, and denied, to amend a judgment so as to conform to the complaint and the verdict. On application for a mandamus this court said:

> "Here a judgment has been rendered and entered of record by the circuit court in a suit within its jurisdiction. The judgment is the act of the court. It is recorded ordinarily by the clerk as the ministerial officer of the court, but his recording is in legal effect the act of the court, and subject to its judicial control. The clerk records the judgments of the court, but does not thereby render the judgments. If there is error in the judgment as rendered it can not be corrected by mandamus, but resort must be had to a writ of error or an appeal. *Ex parte Loring*, 94 U. S. 418; *Ex parte Perry*, 102 U. S. 183.
>
> If a clerk in performing the ministerial act of recording a judgment has committed an error, the court may on motion at the proper time correct it, or it may do so in a proper case upon its own suggestion without waiting for the parties. Here the plaintiffs, believing that the judgment as recorded did not conform to the finding, moved the court to amend it in that particular. This motion the court entertained, but, being of the opinion that the judgment had been correctly recorded, refused the amendment which was asked. In this the court acted judicially, and its judgment on the motion can no more be reviewed by mandamus than that which was originally entered in the cause.

In *Ex parte Brown* (1886), 116 U. S. 401, 402, a mandamus was asked to compel a territorial court to take jurisdiction of a case and hear it on the merits. This court said:

> According to the petition, the court entertained jurisdiction of the cause, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action. This is a judgment which can only be reviewed by writ of error or appeal, as the case may be. Mandamus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. This rule is elementary. *Ex parte Morgan*, 114 U. S. 174, and cases cited.

That the law is as laid down in these cases, notwithstanding any confusion that was thought to have arisen from some other cases, was made plain by the very exhaustive opinion in *Ex parte Harding*, 219 U. S. 363. In that case all these cases were carefully reviewed, and it was pointed out that there were two lines of cases between which there was an apparent conflict, and the holding in one line of cases, which are the cases relied on by petitioner here, explained and to some extent qualified. The general rule was then laid down that the writ of mandamus will not lie to review the action of a district court in a matter over which it has jurisdiction when the action is one which is subject to review on appeal or writ of error. The rule as quoted from *In re James Pollitz*, 206 U. S. 323, 331, is that—

> mandamus can not be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

In the present case there is no question but that the court had jurisdiction of the entire case. It is equally clear that that court had jurisdiction of the petition to amend the record and that it acted judicially thereon. The only thing that the district judge could now be directed to do by the writ of mandamus would be to reverse the judgment he has already rendered. As we have seen, that judgment was subject to review upon writ of error. Obviously, then, the writ of mandamus, if granted in this case, would compel the court below to decide a matter before it in a particular way, and would be used to perform the office of an appeal or writ of error. If it be conceded, which it is not, that the action of the court below was erroneous, it is perfectly clear, under the rule well established in this court, that the petitioner is not entitled to the writ of error.

There is nothing in the cases later than *Ex parte Harding, supra,* which in any way modifies the rule laid down in that case.

In *Ex parte First National Bank* (1913), 228 U. S. 516, 518, a mandamus was asked to compel the lower court to reinstate a bill of exceptions which it had stricken out of the record as not conforming to its rule. In denying the petition this court said:

> We deem it unnecessary to detail the contentions as to the compliance or noncompliance by counsel in the bills of exceptions referred to with the rule of court on the subject, nor do we think it necessary to consider whether the rule warranted the particular exertion of power, and if it did authorize such exertion of power, whether it was amenable to condemnation. In view of the fact that the case was heard below on the merits, and it was not until after such hearing that the court sustained the motion to strike out the bill of exceptions, we are of opinion that the case presented is not one "where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise." (*In re Parker*, 131 U. S. 221.) The court below, in effect, took jurisdiction, and its action in striking out the bill of exceptions was at best but an error committed in the exercise of its judicial discretion, to correct which is the province of a writ of error where the right to such writ obtains. *Ex parte Brown*, 116 U. S. 401; *Ex parte Harding*, 219 U. S. 363.

In *Ex parte American Steel Barrel Company* (1913), 230 U. S. 35, 45, 46, a similar ruling was made as to the refusal of the senior circuit judge to designate a trial judge in place of one claimed to be disqualified. See also *Ex parte Wagner* (1919), 249 U. S. 465, 471.

The rule laid down in *ex parte Harding* was affirmed in *Ex parte Roe*, 234 U. S. 70, 73, and in *Ex parte Park Square Automobile Station*, 244 U. S. 412, it was cleared of certain misconceptions by the statement

that the remarks in *Ex parte Harding* as to the use of the writ of mandamus in cases of the unwarranted exercise of jurisdiction were meant to apply only to those cases where there was no other remedy. The court continued (244 U. S. 415):

> But this did not in the slightest degree qualify or limit the comprehensive rule which was established as to the second class to the effect that, where statutory methods of review of questions of jurisdiction were provided for, they could not be disregarded, and therefore that there was no power to override the statutory provisions by resorting to the writ of mandamus.

In *Ex parte Simons*, 247 U. S. 231, the writ of mandamus or prohibition or certiorari was sought upon the ground that the district judge had transferred a law cause to the equity side of the court and had thus deprived the petitioner of the right to a trial by jury. This order, of course, would not be subject to review on appeal or writ of error until a final judgment or decree in the case. The petition was filed immediately. This court held that the district court was without jurisdiction to try the case on the equity side and that the petitioner was entitled to a trial at law. The jurisdiction of this court was put upon the ground that the district court had refused to take jurisdiction on the law side of the court, Mr. Justice Holmes saying:

> If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt

> with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the district court to produce [proceed] and to give the plaintiff her right to a trial at common law. (Id., pp. 239–240.)

In other words, the court was simply required by mandamus to assume a rightful jurisdiction which it had erroneously repudiated, and the petitioner was not required, before asserting this right, to go through a useless trial in order that a final decree might be rendered and reviewed.

In the present case the district judge did not repudiate jurisdiction. but assumed it, and acted judicially upon the matter presented to him. Moreover, the writ of mandamus could in no way hasten a final determination of the question. The court below had finally acted. It would have been no more burdensome, either to petitioner or the courts, to have sued out a writ of error instead of filing a petition for mandamus in this court.

In Ex parte Abdu, 247 U. S. 27, there was a petition for mandamus to require the clerk of one of the circuit courts of appeals to file a record without a deposit to secure costs. Although declining to grant the writ, upon the ground that the action of the clerk

was proper, the court held that it had jurisdiction and would have granted the writ if the contention made by the petitioner had been correct under the statute. The jurisdiction was placed upon the ground that it was a case in which this court had the ultimate discretionary power to review the cause on certiorari, and that the refusal to file the record would have a deterrent influence upon the practical exertion of that power. In that case, however, the refusal of the clerk to file the record prevented the litigant from bringing his case before the court and obtaining a judgment which might thereafter be be reviewed. The jurisdiction by mandamus rested upon the same principle as in a case in which the court erroneously declines to take jurisdiction.

In Ex parte Peterson, 253 U. S. 300, the jurisdiction was placed upon the same ground. There, in a law case, the trial judge had appointed an auditor for certain purposes. The contention was that this deprived the petitioner of a right to a trial by jury. Upon a careful examination the court held that the order appointing the auditor was, in effect, in aid of an intelligent trial by jury, and hence was a proper order to make, and the writ was denied. The jurisdiction to grant it, however, if the court had taken a different view of the propriety of the order, was sustained, Mr. Justice Brandeis saying (pp. 305–306):

> It is insisted that the district court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his re-

port should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex parte Simons*, 247 U. S. 231, 239, "be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by" a proceeding "that ultimately must be held to have been required under a mistake." The objection to our jurisdiction is unfounded.

These cases do not in any way depart from the rule laid down in *Ex parte Harding, supra*, or, if at all, they only make an exception to that rule in cases where a court makes an order beyond its jurisdiction, the result of which will be to render unnecessary a long and tedious trial in order to have a final judgment reviewed and set aside.

Nothing of that kind is present in this case. No proceedings in the court below were in any event to follow the order which it is claimed was erroneous. That was the final action of the district court. It is plainly an action which the law makes reviewable upon writ of error and there can not be the slightest reason for resorting to the extraordinary writ of mandamus. The case is clearly within the rule laid down in *Ex parte Harding* and the writ should be denied.

It does not appear whether the petitioner has, in fact, sued out a writ of error or intends to do so. But, however this may be, he is now complaining of a matter to which he not only did not except at the time but to which he agreed. In filing this petition he has ignored the plain remedy which the law gave him. If he does not choose to avail himself of this remedy he can not justly complain if this court refuses to depart from the rule which it laid down, with so much care and with the declared purpose of obviating confusion, in *Ex parte Harding*.

CONCLUSION.

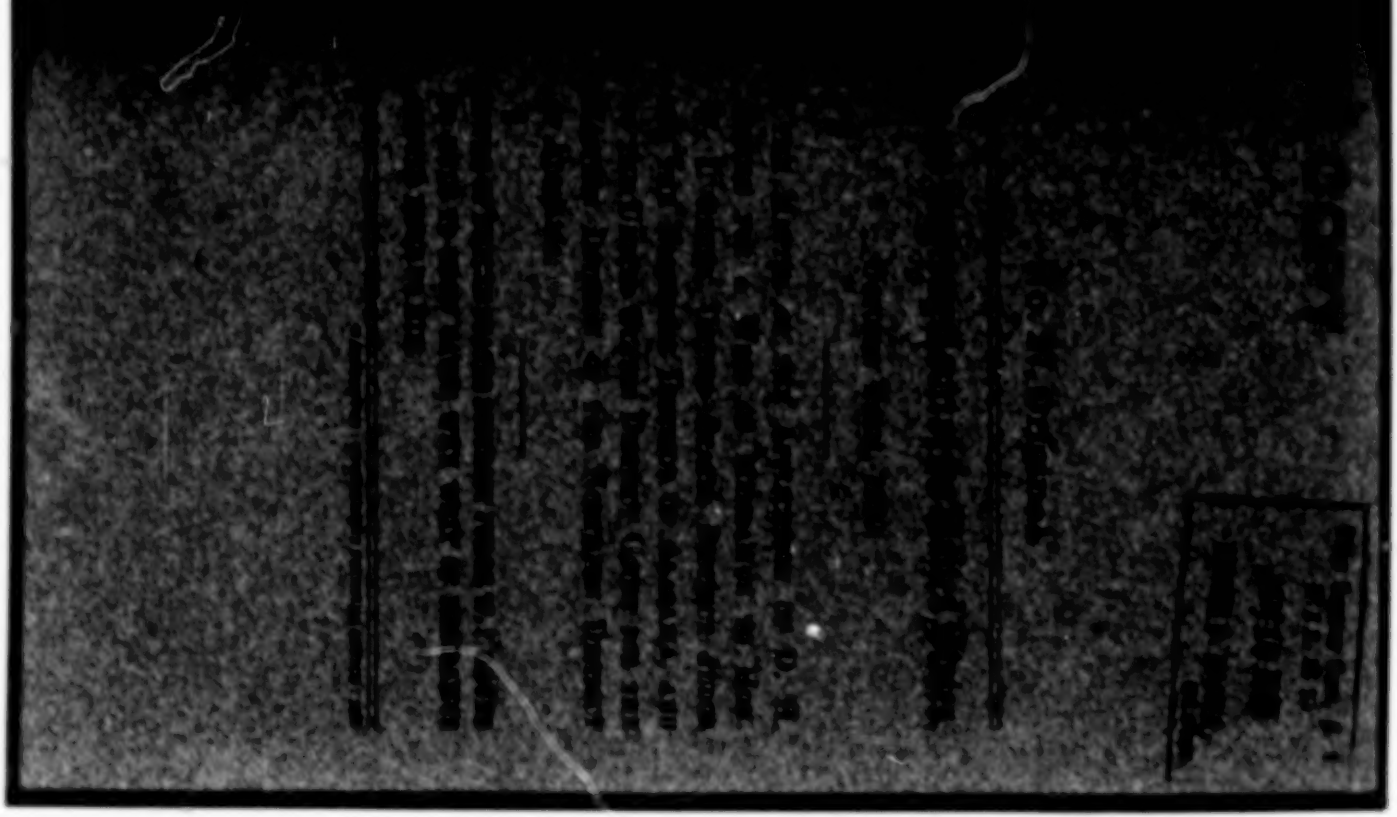
We have not discussed the question as to whether there was any error in the action of the court, or whether the petitioner was deprived of any constitutional right. That question is wholly beside the issue now presented. It is involved in the judgment of the district court, which is subject to review on writ of error.

For the reasons above stated it is respectfully submitted that, upon the petition and answer in this case, the court is clearly without jurisdiction to grant the writ of mandamus and it should be denied.

WILLIAM L. FRIERSON,
Solicitor General.
ERLE PETTUS,
United States District Attorney.
W. C. HERRON,
Attorney.

FEBRUARY, 1921.

○



In the Supreme Court of the United States.

OCTOBER TERM, 1920.

IN THE MATTER OF THE APPLICATION of D. H. Riddle for a writ of mandamus to Hon. W. I. Grubb, United States district judge for the Northern District of Alabama, and to the United States District Court for the Eastern Division of the Northern District of Alabama.	No. 27, Original.

ANSWER OF HON. W. I. GRUBB TO RULE TO SHOW CAUSE WHY WRIT OF MANDAMUS SHOULD ISSUE TO HIM.

The answer of W. I. Grubb, judge of the District Court of the United States for the Northern District of Alabama, to the rule upon him to show cause why a writ of mandamus should not issue to him, as prayed for in the petition of D. H. Riddle filed herein.

The respondent respectfully answers and certifies to the honorable the Supreme Court of the United States as follows:

1. That petitioner was duly indicted, as set out in Appendix B of his petition, in the District

Court of the United States for the Eastern Division of the Northern District of Alabama, and that the minute entries as shown and set out in Appendix B, pages 25 to 48, are correct; that said petitioner was duly convicted and sentenced as therein shown.

2. That thereupon and during the term of said court at which petitioner was convicted, a motion to correct judgment entry and a separate motion to set aside judgment were filed, as shown on pages 49 to 53 of the petition, said motions being made during the said term of court; that upon the hearing of the motion to correct judgment entry, the defendants were present in person and by counsel and the United States was represented by the district attorney; that the court entertained said motion and heard evidence offered thereon, sustaining the objections of the district attorney to such part of the evidence sought to be offered as the court deemed irrelevant, incompetent, immaterial, or otherwise improper; that neither under the State practice in Alabama, nor under the practice in the District Court of the United States for the Northern District of Alabama has it ever been the practice or been customary for the person against whom motion is made to file any joinder of issue; that the hearing of this motion proceeded on the merits in accordance with the usual practice in cases of litigated motions and the Government, being represented by the district attorney, resisted the motion

and the matter was tried upon such hearing as if the Government had joined issue upon the motion; that, upon the conclusion of the evidence by the movants, when the movant's counsel stated that he rested, the court turned to the district attorney and inquired whether or not the Government desired to offer any evidence, whereupon the district attorney replied that the Government did not care to offer any evidence, and thereupon the court overruled and denied the motion, stating from the bench at the time that in the judgment of the court the record was as it should be.

3. That the motion to set aside the judgment was likewise submitted in the same manner and upon the same evidence and was overruled and denied by the court.

4. The said motion was heard on the 26th day of October, 1920, during the term at which the petitioner had been convicted, and the said term of court adjourned by operation of law on the first Monday of November, 1920.

5. So far as the affidavit of the stenographer is concerned, there is no official stenographer for the District Court of the Northern District of Alabama, but the person who makes the affidavit is a person employed by some of the parties, and his certificate is not a part of the record in the case.

6. Respondent attaches to his answer a certified copy of all the various minute entries and final

records of the District Court of the United States for the Northern District of Alabama, Eastern Division thereof, upon the trial of the case of *United States* v. *D. H. Riddle et al.*, together with a certificate of the clerk of said court to the effect that these are all of the minute entries in said case, and respondent hereby certifies that the same is a full, true, and complete transcript of all of the minute entries entered in said court, and further certifies that there are no bench notes or other records, or quasi records of any kind or character of said court or said judge taken at the trial of said case or in any wise in conflict with the final record hereto attached marked Exhibit "A" and made a part of this return.

7. Respondent is advised that it is not necessary that he should make any further or other answer to the rule aforesaid than this herein contained, nor more specifically to any of the allegations set forth in the petition for mandamus aforesaid. And having fully answered said rule, he prays to be hence dismissed and that the rule be discharged.

W. I. GRUBB,

Judge of the District Court of the United States for the Northern District of Alabama.

EXHIBIT "A."

COURT RECORD.

MONDAY, MAY 3D, 1920.

THE UNITED STATES OF AMERICA,
Northern District of Alabama,
Eastern Division:

Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Alabama, begun and held at the United States court rooms, in the city of Anniston, in said division and district, on the first Monday in May, it being the 3d day thereof, in the year of our Lord one thousand nine hundred and twenty and of the independence of the United States of America the one hundred forty-fourth year.

Present: Hon. W. I. Grubb, judge of the District Court of the United States for the Northern District of Alabama, and Hon. Erle Pettus, United States attorney; Chas. J. Allison, clerk; and H. A. Skeggs, United States marshal.

MONDAY, AUGUST 16TH, 1920.

The District Court of the United States for the Eastern Division of the Northern District of Alabama met pursuant to adjournment: Present, Hon. W. I. Grubb, United States district judge, Northern District of Alabama, presiding; Hon. Erle Pettus, United States attorney; H. A. Skeggs, United States marshal; and Chas. J. Allison, clerk.

UNITED STATES
vs.
D. H. RIDDLE, W. A. SAVAGE, A. M. SAVAGE, W. O. Wooten, W. G. Hardy, T. A. St. John, S. E. Graham.

This cause coming in to be heard this day, come the parties hereto, the United States of America, by United States Attorney Erle Pettus, cometh also each of the defendants herein in his own proper person and by counsel, and defendants submit demurrer to the indictment filed herein against them, and each of them, charging an alleged violation of sec. 37 and 215 of the Penal Code of the United States. After understanding said demurrers, it is ordered by the court that said demurrers be sustained as to counts one and three of the indictment, and that said demurrers be overruled as to counts two, four, five, six, and seven of the indictment.

Thereupon defendants submit motion for severance as to each defendant and, after understanding said motion, it is ordered by the court that the same be, and hereby is, overruled and denied, to which ruling of the court each defendant excepts separately and severally.

Thereupon the defendants and each of them being arraigned in open court upon the indictment filed herein against them, they and each of them plead not guilty thereto and, for defense, throw themselves upon their country, as doth also the United States attorney.

To try this cause come a jury of good and lawful men duly impanelled, sworn, and charged a true verdict to render according to the law and the evidence.

During the introduction of the evidence, the hour of daily adjournment having arrived, it is ordered by the court that this cause be and the same is continued for further hearing until nine o'clock a. m. to-morrow morning, August 17th, 1920.

TUESDAY, AUGUST 17TH, 1920.

UNITED STATES
vs.
D. H. RIDDLE, W. A. SAVAGE, A. M. SAVAGE, W. O. Wooten, W. G. Hardy, T. A. St. John, S. E. Graham.

This being the day and the hour to which this cause was on yesterday continued for further hearing, come again the parties hereto, the United States of America by United States Attorney Erle Pettus, and cometh also each of the defendants in his own proper person and by counsel, and cometh also the jury heretofore selected, impanelled, sworn, and charged to try this cause, and the further hearing of this cause is resumed and begun.

During the introduction of the evidence, the hour of daily adjournment having arrived, it is ordered by the court that this cause be and same is hereby continued for further hearing until nine o'clock a. m. August 18th, 1920.

WEDNESDAY, AUGUST 18TH, 1920.

UNITED STATES

vs.

D. H. RIDDLE, W. A. SAVAGE, A. M. SAVAGE, W. O. Wooten, W. G. Hardy, T. A. St. John, S. E. Graham.

This being the day and the hour to which this cause was on yesterday continued for further hearing, come again the parties hereto, the United States of America, by Erle Pettus, United States attorney, and cometh also each of the defendants in his own proper person and by counsel, and cometh also the jury heretofore selected, impanelled, sworn, and charged to try this cause, and the further hearing of this cause is resumed and begun.

During the introduction of the evidence, the hour of daily adjournment having arrived, it is ordered by the court that this cause be and the same is continued for further hearing until nine o'clock a. m., August 19th, 1920.

THURSDAY, AUGUST 19TH, 1920.

UNITED STATES

vs.

D. H. RIDDLE, W. A. SAVAGE, A. M. SAVAGE, W. O. Wooten, W. G. Hardy, T. A. St. John, S. E. Graham.

This being the day and hour to which this cause was on yesterday continued for further hearing, come again the parties hereto, the United States of America, by United States Attorney Erle Pettus; cometh also each of the defendants in his own proper person and by counsel; cometh also the

jury heretofore selected, impanelled, sworn, and charged to try this cause; and the further hearing of this cause is resumed and begun.

After the introduction of all the evidence in the case, the argument of counsel on behalf of the United States of America and on behalf of each of the defendants, separately and severally, and the oral charge delivered by the court, the jury retire in charge of an officer of this court to consider of their verdict.

Thereupon the daily hour of adjournment having arrived and the jury having this cause under consideration not having as yet agreed upon a verdict, it is ordered, adjudged, and decreed by the court that this cause be, and the same is hereby, continued until 8.30 a. m., August 20th, 1920, for the purpose of receiving the verdict of the jury in said cause in the event the jury shall by that time have reached and agreed upon a verdict in this cause.

FRIDAY, AUGUST 20TH, 1920.

UNITED STATES

vs.

D. H. RIDDLE, W. A. SAVAGE, A. M. SAVAGE, W. O. Wooten, W. G. Hardy, T. A. St. John, S. E. Graham.

This being the day and the hour to which this cause was on yesterday continued for the report of the jury, cometh again the parties hereto, the United States of America by United States attorney; cometh also each of the defendants in his own proper person and by counsel; cometh also the

jury heretofore selected, impanelled, sworn, and charged to try this cause.

Thereupon the jury being inquired of by the court as to whether or not they had been able to reach a verdict, and the jury making known to the court that they have reached and agreed upon their verdict, the jury return in open court the following verdict, which is read in open court by the clerk of this court, and in the presence of each of the defendants, to wit: "We, the jury, find the defendants W. A. Savage, A. M. Savage, W. O. Wooten, D. H. Riddle, T. A. St. John, S. E. Graham, and W. G. Hardy guilty as charged under counts 2, 4, and 5 of the indictment. J. W. McClurkin, foreman."

Thereupon motion is made by the defendants that the jury be polled, which said motion is granted by the court, and each member of the jury is asked by the clerk of this court to state whether or not the above verdict is his verdict, and each member of the jury stated that the above verdict is his verdict, which said poll of the jury is taken in open court and in the presence of each of the defendants and their counsel.

Thereupon the defendants and each of them being separately and severally inquired of by the court and showing no good or sufficient cause why sentence should not now be pronounced upon him, it is

Ordered, adjudged, and decreed by the court that the defendant W. A. Savage be and hereby is sentenced to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of one hundred dollars on count two of

the indictment, and is further sentenced to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during a period of thirteen months, and to pay a fine of one hundred dollars on count four of the indictment, said sentence of imprisonment and confinement under count four of the indictment to commence at the termination of the sentence of imprisonment and confinement imposed upon the defendant W. A. Savage under count two of the indictment; and it is further ordered, adjudged, and decreed by the court that the defendant W. A. Savage be further sentenced, and he hereby is further sentenced, to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of one thousand dollars under count five of the indictment, said sentence of imprisonment and confinement under count five of the indictment to commence at the termination of the sentence of imprisonment and confinement imposed upon the defendant under count four of the indictment; and thereupon it is further

Ordered, adjudged, and decreed by the court that the defendant D. H. Riddle be, and he is hereby, sentenced to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during the period of thirteen months and to pay a fine of one hundred dollars on count two of the indictment; and it is further ordered, adjudged, and decreed by the court that the defendant D. H. Riddle be, and he hereby is, further sentenced to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during a period of thirteen

months and to pay a fine of one hundred dollars on count four of the indictment, said sentence of imprisonment and confinement under count four of the indictment to commence at the termination of the sentence of imprisonment and confinement under count two of the indictment; and it is further ordered, adjudged, and decreed by the court that the defendant D. H. Riddle be, and he hereby is, further sentenced to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of ten thousand dollars on count five of the indictment, said sentence of imprisonment and confinement under count five of the indictment to commence at the termination of the sentence of imprisonment and confinement imposed under count four of the indictment; and thereupon, it is further

Ordered, adjudged, and decreed by the court that the defendant W. O. Wooten be and he hereby is sentenced to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of one hundred dollars on count two of the indictment; and it is further ordered, adjudged, and decreed by the court that the defendant W. O. Wooten be and he hereby is further sentenced to be imprisoned and confined in the United States penitentiary, at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of one hundred dollars on count four of the indictment, said sentence of imprisonment and confinement under count four of the indictment to commence at the termination

of the imprisonment and confinement imposed under count two of the indictment; and it is further ordered, adjudged, and decreed by the court that the defendant W. O. Wooten be and he hereby is further sentenced to be imprisoned and confined in the United States penitentiary, at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of one thousand dollars on count five of the indictment, said sentence of imprisonment and confinement under count five of the indictment to commence at the termination of the sentence of imprisonment and confinement imposed under count four of the indictment; and thereupon it is

Ordered, adjudged, and decreed by the court that the defendant W. G. Hardy be and he hereby is sentenced to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of one thousand dollars; and thereupon, is is further

Ordered, adjudged, and decreed by the court that the defendant A. M. Savage be and he hereby is sentenced to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during a period of eighteen months and to pay a fine of one thousand dollars; and thereupon, it is further

Ordered, adjudged, and decreed by the court that the defendant T. A. St. John be and he hereby is sentenced to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during a period of thirteen months, and to pay a fine of one thousand dollars; and thereupon it is further

Ordered, adjudged, and decreed by the court that the defendant S. E. Graham be and he is hereby sentenced to be imprisoned and confined in the United States penitentiary at Atlanta, Georgia, for and during a period of thirteen months and a fine of one thousand dollars.

WEDNESDAY, SEPTEMBER 15TH, 1920.

The District Court of the United States for the Eastern Division of the Northern District of Alabama met pursuant to adjournment: Present, Hon. W. I. Grubb, United States district judge, Northern District of Alabama, presiding; Erle Pettus, United States attorney; H. A. Skeggs, United States marshal; and Chas. J. Allison, clerk.

UNITED STATES

vs.

D. H. RIDDLE, A. M. SAVAGE, W. O. WOOTEN, W. G. Hardy, T. A. St. John, S. E. Graham, W. A. Savage.

Order granting extension of time to file "bill of exceptions."

The above petition having this day been presented to the undersigned, it is ordered by the court, and it is the judgment and decree of the court, that the time for signing and filing a bill of exceptions on the part of said defendants, separately and severally, be and it is hereby extended to and including the 1st day of December, 1920.

This the 15th day of September, 1920.

W. I. GRUBB, *Judge.*

MONDAY, OCTOBER 25TH, 1920.

The District Court of the United States in and for the Eastern Division of the Northern District of Alabama met pursuant to adjournment: Present, Hon. W. I. Grubb, United States district judge, Northern District of Alabama, presiding; Erle Pettus, United States attorney; Ralph W. Quinn, assistant United States attorney; Jim C. Smith, assistant United States attorney; H. A. Skeggs, United States marshal; and Chas. J. Allison, clerk.

UNITED STATES
vs.
W. A. SAVAGE ET AL.

A motion to make certain changes in the final record having been made in said cause by one of the defendants, namely, D. H. Riddle, said motion being set for hearing at Anniston on October 25, 1920,

It is considered by the court that the presence of the defendants in said cause are necessary on the hearing of said motion. It is therefore ordered by the court that all of said defendants who are on bond be notified to be present at said date. It is further ordered that the warden of the United States penitentiary at Atlanta, Georgia, be and he is hereby ordered to produce at said hearing on said date at Anniston said defendants, W. A. Savage and A. M. Savage, who are now confined in said penitentiary.

This 25th day of October, 1920.

W. I. GRUBB,
United States District Judge.

TUESDAY, OCTOBER 26TH, 1920.

The District Court of the United States in and for the Eastern Division of the Northern District of Alabama, met pursuant to adjournment: Present, Hon. W. I. Grubb, United States district judge, Northern District of Alabama, presiding; Erle Pettus, United States attorney; Ralph W. Quinn, assistant United States attorney; Jim C. Smith, assistant United States attorney; H. A. Skeggs, United States marshal; and Chas. J. Allison, clerk.

UNITED STATES

vs.

D. H. RIDDLE, W. O. WOOTEN, W. A. SAVAGE, A. M. Savage, T. A. St. John, W. G. Hardy, S. E. Graham.

The motion to amend the record of the judgment entry in this cause coming on to be heard this day, and the plaintiff appearing by the Hon. Erle Pettus, United States district attorney, and the defendants all being present in person, and the movant, D. H. Riddle, being present in person and by attorney, evidence was offered by the movant in support of the motion, and the court, after hearing the argument of counsel for the movant, being of the opinion that the record of the judgment entry is as it should be and does not need amendment, and that the motion is not well taken,

It is ordered and adjudged by the court that said motion be and is hereby denied, and the movant excepts to the ruling of the court in this behalf.

TUESDAY, OCTOBER 26TH, 1920.

UNITED STATES

vs.

D. H. RIDDLE, W. O. WOOTEN, W. A. SAVAGE, A. M. Savage, T. A. St. John, W. G. Hardy, S. E. Graham.

The motion, to set aside the judgment in this cause coming on to be heard, this day, comes the plaintiff appearing by the Hon. Erle Pettus, United States district attorney, and the defendants, all being present in person, and the movant, D. H. Riddle, being present in person and by attorney, evidence was offered by the movant in support of the motion, and the court, after hearing the evidence and argument of counsel for the movant, being of the opinion that said motion is not well taken,

It is ordered and adjudged by the court that the motion be and is hereby denied, and that the judgment heretofore entered in this cause be and is hereby in all things affirmed, and the movant excepts to the ruling of the court in this behalf.

FRIDAY, NOVEMBER 12TH, 1920.

The District Court of the United States for the Eastern Division of the Northern District of Alabama met pursuant to adjournment: Present, Hon. W. I. Grubb, United States district judge, Northern District of Alabama, presiding; Hon. Erle Pettus, United States attorney; H. A. Skeggs, United States marshal; and Chas. J. Allison, clerk.

UNITED STATES *vs.* D. H. RIDDLE, A. M. SAVAGE, W. A. SAVAGE, T. A. St. John, S. E. Graham, W. G. Hardy, W. O. Wooten.	Order.

In this cause, for good cause shown, it is ordered by the court that the time for presenting and filing the bill of exceptions embracing all matters excepted to prior to the time of the order and agreement of extension, heretofore made and entered into, but not affecting any exceptions taken in said cause after the original order and agreement of extension was made and entered into, this order not applying to any such subsequent exceptions; and it is hereby extended to and including the 1st day of January, 1921, subject to the condition that the defendant D. H. Riddle consent to the submission of the writ of error as provided for in the original agreement of extension.

Given this 12th day of November, 1920.

W. I. GRUBB, *Judge.*

UNITED STATES OF AMERICA,
Northern District of Alabama:

I, Charles J. Allison, Clerk of the District Court of the United States of America in and for said division of said district, do hereby certify that the foregoing is a true, full, and complete copy of the minutes and decrees entered of record in this court in the matter of the *United States of America* vs. *D. H. Riddle, W. O. Wooten, A. M. Savage, W. A. Savage, W. G. Hardy, S. E. Graham, and T. A. St. John,* No. 744, criminal docket, as fully as the same does appear of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office in the city of Birmingham, in said district, this 31st day of December, 1920.

[SEAL.] CHAS. J. ALLISON,
Clerk of the U. S. District Court.

O

SUPREME COURT OF THE UNITED STATES.

No. 27, ORIGINAL.—OCTOBER TERM, 1920.

Ex parte In the matter of D. H. Riddle, Petitioner. } On Petition for Writ of Mandamus.

[March 21, 1921.]

Mr. Justice HOLMES delivered the opinion of the Court.

The petitioner was indicted for a violation of § 215 of the Criminal Code of the United States by a use of the mails in furtherance of a scheme to defraud. This is a felony, § 235, and therefore, we assume, must be tried by a jury of twelve. The petitioner was tried, convicted and sentenced, the record stating that "to try this cause come a jury of good and lawful men duly impaneled, sworn and charged a true verdict to render according to the law and the evidence." During the term the petitioner filed a motion setting forth that as the result of an agreement between himself and the District Attorney the case was tried before a jury of eleven, and asking to have the record corrected to show the fact. There was also another motion to set aside the judgment on this ground. The record recites that after hearing the evidence and argument the Court being of opinion that the record is as it should be, and does not need amendment, denies the motion, and similarly denies the motion to set aside the judgment. The record discloses exceptions to both orders but sets forth no grounds. No exception to the jury seems to have been taken nor does the fact alleged or the exclusion of any evidence competent to prove it appear of record in any form.

The petitioner now comes here asking for a mandamus to correct the judge's conclusion and setting forth evidence offered in support of his motion that was rejected and that he says should have been received. He might have saved the point by an exception at the trial or by a bill of exceptions to the denial of his subsequent motion, setting forth whatever facts or offers of proof were material, and

then have brought a writ of error. *Nalle* v. *Oyster*, 230 U. S. 165, 177. In such cases mandamus does not lie. Ordinarily, at least, it is not to be used when another statutory method has been provided for reviewing the action below, or to reverse a decision of record. *Ex parte Morgan*, 114 U. S. 174; *Ex parte Park Square Automobile Station*, 244 U. S. 412, 414. In this case the facts were more or less clearly admitted at the argument but the record does not establish them and the extent of agreement or dispute with regard to them does not change the remedy to be sought.

Rule to show cause discharged.
Writ denied.

A true copy.

Test:

Clerk Supreme Court, U. S.